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# ADMINISTRATIVE CODE COMMITTEE

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BIENNIAL REPORT  
TO THE  
FORTY-EIGHTH LEGISLATURE

December 1982



Published by  
**MONTANA LEGISLATIVE COUNCIL**  
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ADMINISTRATIVE CODE COMMITTEE BIENNIAL REPORT  
TO THE  
FORTY-EIGHTH LEGISLATURE

December 1982

PART I

History, Function, and Activities of the  
Administrative Code Committee

The Administrative Code Committee is a permanent joint committee of the Montana Legislature, established in 1975 by Title 5, Ch. 14, part 1, MCA. The committee consists of four members of both the House and the Senate appointed in the same manner as standing committees of the Legislature. The chairman of the Administrative Code Committee is selected by the Committee members. During the biennium covered by this report, the staff of the Committee consisted of one attorney, employed by the Legislative Council, who devoted approximately one-half of his time to Committee business. Six other staff lawyers and a secretary employed by the Council also provided services to the Committee on a part-time basis, reviewing rules of administrative agencies and performing clerical tasks. Meetings of the Administrative Code Committee were held every four to six weeks, or as often as necessary.

The purpose of the Administrative Code Committee, as reflected in the statutes defining its powers and duties, is to review rules proposed and adopted by administrative agencies and filed with the Office of the Secretary of State under the provisions of the Montana Administrative Procedure Act (MAPA), and to generally oversee compliance with the requirements of MAPA. While this authority includes the ability to oversee compliance with those parts of Title 2, Ch. 4, MCA, concerning contested case procedure and judicial review of contested cases, by far the largest amount of the Committee's time over the biennium has been devoted to aspects of the rulemaking process itself. The Committee believes this emphasis is appropriate, for not only are the contested case procedures somewhat beyond the authority of the Committee (with the exception of the recommended amendments to statutes) but it has been the intention of the Committee to serve both as a body to provide routine review of executive agency rules and as a forum to which persons with complaints concerning executive rules and executive agency action

founded on those rules may turn for less expensive and more timely solutions than legal challenges to agency authority. For this reason, the Committee has sought to publicize its functions in the Montana Administrative Register, in rulemaking hearings, and has undertaken other efforts to publicize its existence and functions.<sup>1</sup>

Since publication of the Committee's Biennial Report to the Forty-Seventh Legislature in December of 1980, the Committee has held fifteen meetings to review rules published in the Montana Administrative Register, hear testimony, consider legislation and conduct studies on specific topics. A schedule of Committee meetings and a summary of the matters discussed follows:

<u>Meeting Date</u>	<u>Meeting Topics</u>
February 6, 1981	Election of Committee Chairman and Vice Chairman; discussion of decision by previous Administrative Code Committee to intervene in law suits against Department of Health over adoption of air pollution rules; consideration of request by Montana League of Cities and Towns for economic impact statement on proposed PSC rules governing water service; consideration of staff reports on rulemaking procedure and status of Committee bills.
February 11, 1981	Review of 1980 MAR Issues 23 and 24 and 1981 MAR Issues 1 and (2); further discussion of request by Montana League of Cities and Towns for economic impact statement on proposed PSC rules governing water service; discussion of Committee intervention in law suits against Department of Health.
April 17, 1981	Review of 1981 MAR Issues 3 through 6; consideration of rules proposed by the Board of Land Commissioners relating to surface licenses; consideration of staff reports on the status of Committee litigation;

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<sup>1</sup>See Part III, paragraph 5 of this report.



	discussion of legislation concerning rulemaking.
July 9, 1981	Review of 1981 MAR Issues 7 through 11; consideration of testimony relating to cultural and aesthetic project grant rules proposed by the Historical Society; consideration of testimony relating to surface license rules proposed by the Board of Land Commissioners and relating to the indexing and costs of the Montana Administrative Register; consideration of staff report on study of statutes requiring the adoption of rules but for which no rules have been adopted; Committee directs mailing of rules to prime sponsor(s) of implemented statute(s).
September 24, 1982	Review of 1981 MAR Issues 12 through 16; consideration of testimony relating to <u>The Montana Taxpayers Association v. The Department of Revenue</u> , Lewis and Clark County Civil No. 47126; further discussion of Historical Society rules on cultural and aesthetic project grants; discussion of necessity for agencies to adopt model rules changes for timely implementation of amendments to MAPA; discussion of Committee representation on NCSL Regulatory Improvement Committee; consideration of increase in fees for notices published in MAR.
November 9, 1981	Review of 1981 MAR Issues 17 through 20; consideration of testimony on Department of Institution rules on alcohol treatment centers; discussion of Secretary of State's ethics commission rules; consideration of staff report on adoption of policy as a rule; further discussion of staff report on statutes mandating the adoption of rules; discussion of possible amendment to MAR fee schedule.

January 22, 1982

Review of 1981 MAR Issues 21 through 23; discussion of statutory requirement that rules be necessary to implement a statute; discussion of necessity of review of rules adopted prior to the creation of the Committee; consideration of staff report on Committee litigation; further discussion of Secretary of State's ethics commission and opinion rules.

February 26, 1982

Review of 1982 MAR Issues 1 through 4; further discussion of MAR filing fees changed by the Secretary of State; consideration of testimony regarding solid waste disposal facility rules; further discussion of Committee litigation; discussion of licensing examinations administered by the State Electrical Board; consideration of staff report on litigation to enjoin the enforcement of the Secretary of State's ethics rules; consideration of proposed bill drafts; further discussion of staff study on statutes mandating rulemaking; discussion of fees set by the various professional and occupational licensing boards under the authority of Ch. 345, L. 1981; discussion of sunset of administrative rules.

March 24, 1982

Further consideration of testimony regarding solid waste disposal facility rules; further consideration of testimony relating to MAR filing fees charged by the Secretary of State; consideration of testimony by members of state Electrical Board regarding rules on licensing examinations; discussion of Department of Agriculture endrin rules and accompanying preliminary environmental review; consideration of testimony on rules implementing the Montana Lobbyist Disclosure Act; consideration of testimony on liquor price increase proposed by Department of Revenue;

consideration of testimony on rules proposed by the Department of Social and Rehabilitation Services relating to reimbursement of nursing home construction costs.

April 27-28, 1982

Review of 1982 MAR Issue No. 6; further consideration of testimony regarding rules on nursing home cost reimbursement; further consideration of MAR filing fees; further discussion of amendments to solid waste disposal facility rules; further discussion of liquor price increases proposed by the Department of Revenue; consideration of staff report on the status of Electrical Board licensing actions; discussion of administrative abuse of rulemaking authority; consideration of staff report on rules implementing the Montana Lobbyist Disclosure Act; further discussion of fee increases by professional and occupational licensing boards; discussion of court's decision in Montax v. Department of Revenue; further discussion of time limitations upon and sunset of administrative rulemaking; further discussion of MAR filing fees; consideration of report from Secretary of State's Office concerning county maintenance and upkeep of MAR and ARM.

May 27, 1982

Review of 1982 MAR Issues 7 through 9; consideration of proposed Committee legislation LC's 9, 10, 17, 20, 21, 22, and 23.

July 27, 1982

Review of 1982 MAR Issues 10 through 12; consideration of testimony concerning Board of Realty Regulation rule on trust accounts; further discussion of Department of Revenue proposed liquor price increases; discussion of Committee bills introduced in the 47th Legislature; consideration of testimony of proposed road management policy of Department of Fish,



Wildlife, and Parks; further consideration of staff report on statutes mandating rules; further discussion of licensing practices of the state Electrical Board.

September 17, 1982      Review of 1982 MAR Issues 13 through 15; consideration of testimony concerning certificate of need rules proposed by the Department of Health; discussion of "workfare" rules proposed by the Department of Social and Rehabilitation Services; discussion of Committee sponsorship of rulemaking informational pamphlet; further discussion of amendments proposed to rules on solid waste disposal facilities.

November 17 and  
18, 1982      Review of 1982 MAR Issues 16 through 19; further consideration of staff study on statutes mandating the adoption of rules; consideration of staff report comparing MAPA to the Model State Administrative Procedure Act (1981); consideration of agency reports on proposed amendments to rulemaking authority; consideration of agency reports on litigation under MAPA; discussion of possible legislation; discussion of proposed Committee bills LC's 9, 10, 17, 19, 20, 21, 22, 23, and 64; consideration of staff reports on the status of certificate of need rules and proposed amendments to rules on solid waste disposal facilities, both of the Department of Health; consideration of testimony on rules proposed by the Board of Morticians.

December 16, 1982      Review of 1982 MAR Issues 20 through 22; consideration of further testimony on Board of Morticians rules; discussion of Committee bill drafts LC's 9, 21, 321, 322, 323, 324, and 325; consideration of staff reports on study of statutes mandating rules and other matters.



## PART II

### The Need for the Montana Administrative Procedure Act and Legislative Oversight of Administrative Rulemaking

In Montana, as in most states, the state constitution provides that the lawmaking function is a function of the Legislature and declares that certain procedures must be used in order to enact laws.<sup>2</sup> However, since the early history of the state it has also been a recognized principle of law that the legislature may delegate the power to enact rules to the executive branch, comprised of agencies that are themselves created by the Legislature.<sup>3</sup> This system of the delegation of legislative authority to enact rules binding as law has its support not only in law but also in reason, for the Legislature, being a part-time body and lacking expertise in the many varied purposes of state government, cannot itself have the time, knowledge, and resources to administer the many detailed provisions of the law it enacts. To facilitate the administration of complex legislation the Legislature authorizes rules and most rules must be adopted pursuant to the requirements of MAPA.

Because of the definition of "agency" contained in the Montana Administrative Procedure Act, the Act and the rulemaking procedure required by it apply to most state agencies.<sup>4</sup> By its application the Act has standardized many functions of administrative agencies, the most important of which may be the rulemaking function delegated by the Legislature. As a result, persons doing business with state agencies are no longer forced to obtain information concerning rule-making and copies of agency rules solely from the agencies themselves, no longer have to distinguish between the many different forms and styles of separate agency regulations, and no longer have to take the chance that an agency may have adopted rules in a

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<sup>2</sup>Article V, §1, Montana Constitution; Article V, §11, Montana Constitution.

<sup>3</sup>See, e.g., *Chicago, M. & St. P. Ry Co. v. Board of Railroad Comm'rs.*, 76 Mont. 305, 247 P. 162 (1926).

<sup>4</sup>2-4-102(2) and 2-3-102, MCA; certain exceptions exist, such as the Governor and the Board of Regents.

manner unknown and undiscoverable by the general public. Under MAPA, all proposed and adopted rules of every agency covered by the Act must be printed in the Montana Administrative Register, published twice monthly by the Secretary of State, interested persons must be given an opportunity to comment on proposed rules, and the adopted rule must be published in one compilation of state administrative rules. Much good has resulted from these provisions, applying as they do, uniformly to state agencies. The purpose and effect of the Act, however, has sometimes been misconstrued. As the Committee noted in an earlier report to the Legislature,<sup>5</sup> the Administrative Procedure Act itself has sometimes been blamed for the proliferation of agency rules and its repeal has sometimes been advocated as the cure to prevent the adoption of those rules. But as the Committee also noted in that previous report, the Administrative Procedure Act does not in itself grant rulemaking authority to state agencies and a section of the Act now plainly so states.<sup>6</sup> Rulemaking authority has instead been granted by the

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<sup>5</sup>Report of the Administrative Code Committee to the Forty-Fifth Montana Legislature (December 1976, p. 5).

<sup>6</sup>The 1976 Report of the Administrative Code Committee to the Forty-Fifth Legislature reads in part:

...the committee has noted a widespread misunderstanding that the APA is the cause of rules. To clear up any confusion on this issue, the committee has proposed language from the California statutes declaring that the APA can never be used as authority to adopt a substantive rule, and that rule (sic) adopted under authority of another statute must be reasonably necessary to effectuate the purpose of that other statute.

Sec. 2-4-301, MCA, now provides as follows:

(1) Except as provided in part 2 [which applies only to organizational and procedural rules], nothing in this chapter confers authority upon or augments the authority of any agency to adopt, administer, or enforce any rule.

Legislature in individual sections of the law scattered throughout the Montana Code Annotated. A typical grant of rulemaking authority, Sec. 37-32-201, MCA, states, with respect to the Board of Cosmetologists, as follows:

37-32-201. Rulemaking power. The board may adopt rules in accordance with the Montana Administrative Procedure Act to implement this chapter and to properly regulate this profession.

The number of grants of rulemaking authority may surprise some. Six years ago, the Administrative Code Committee Report listed almost 350 statutory sections delegating authority for agencies to adopt administrative rules and also noted that the total number of statutory sections granting rulemaking authority was probably even higher.<sup>7</sup> As the 1976 Committee report also found, the grants of rulemaking authority that are enacted by the Legislature are often worded in such a manner as to provide little detail and little guidance to executive agencies on the manner in which its rulemaking authority is to be exercised.<sup>8</sup> While this concern has, as mentioned, previously been the subject of Committee reports to the Legislature, the findings and cautionary remarks and remedial legislation recommended by previous committees is worth noting because rulemaking grants must of necessity continue to be enacted. By way of a solution to the problem of loosely worded and hastily considered delegations of rulemaking authority, the 1976 report of the Administrative Code Committee recommended, and the 45th Legislature enacted, a law requiring each house of the Legislature to provide by joint resolution for a procedure for the adoption of statements of legislative intent whenever rulemaking authority is delegated.<sup>9</sup>

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<sup>7</sup>Report of the Administrative Code Committee to the 45th Montana Legislature (December 1976), pp. 5-7.

<sup>8</sup>Id., p. 9.

<sup>9</sup>Ch. 560, L. 1977; Title 5, Ch. 4, MCA.



Chapter 11 of the Joint Rules of the Legislature and the resulting statements of legislative intent have been used successfully by the Committee and its staff in guiding the agency rulemaking process.<sup>10</sup>

Over the nearly eight years since the Committee's creation in 1975, the Committee has sponsored other legislation, in addition to that requiring statements of intent, to help the Legislature exert more influence in the rulemaking process. The biennium covered by this Report of the Committee is no exception, as the Committee has recommended a series of bills, described in Part IV of this Report, to give the Legislature additional tools to influence the substance and procedure of agency rulemaking.

Statements of legislative intent, hearings on agency rules, and similar "mechanical" devices, while certainly helpful, cannot however be relied upon in all instances to assure a legal implementation of legislative intention by the agency, much less the "best", most practical, or least expensive implementation of legislative intent. Whether because of oversight, inaccurate use of language, the limited time allowed for legislative or committee action, or simple inability to foresee possible legal or economic consequences, it appears almost impossible as a practical matter to frame grants of rulemaking authority and the statutes implemented by them in a manner acceptable to all interests. Hindsight therefore must therefore be used and legislative oversight becomes a practical necessity. As the Committee believes that few if any administrators would intentionally go beyond legal authority granted, the ability of the Committee to go beyond and not be restrained by judicial standards of unreasonableness or arbitrariness in its review process and to recommend alternative solutions within the framework of the legislative grant of authority is a necessary element of legislative oversight.

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<sup>10</sup>For example, rules originally proposed by the Board of Dentists in 1980 provided for the submission by licensing applicants of several items also included in the statute authorizing the rule. The statement of intent, adopted pursuant to Title 5, Ch. 4, MCA, provided that the authorizing statute gives the Board of Dentists the "authority to make rules for application procedures for dentists and hygienists, respectively. It is intended that these rules would cover routine matters not provided for in the statute." On this basis the Committee staff objected to the regulations proposed by the Board.



## PART III

### Review of Agency Rules

The Committee is required by 2-4-402, MCA, to review "all proposed rules filed with the Secretary of State". The review of rules by the Committee under this section is conducted primarily to determine compliance with statutory requisites for valid rules. Under 2-4-305, no rule is effective unless (1) each substantive rule adopted is within the scope of authority conferred by the Legislature and in accordance with other statutory standards; (2) the rule is consistent with the statute and reasonably necessary to carry out the purpose of the statute; and (3) it substantially complies with the requirements of the law relating to the procedure for adoption (e.g., notice, hearing, and submission of comments on the rule). In order to determine whether a rule complies with these statutory standards, the Committee must review the statute authorizing rulemaking as well as the substantive law implemented by the rule, and must review the procedure used by the agency to propose or adopt the rule. Then, too, the Committee reviews the rule for such additional considerations as length, clarity, and economic impact.

The review procedure used by the Committee begins in every instance with a review by a staff lawyer for both substantive and procedural compliance with the statutes. If an error in any proposed or adopted rule is discovered, the reviewing lawyer notifies the agency concerned and recommends a solution. If the agency agrees with the staff comments and agrees to implement the proposed remedy, the staff objection and agency response are noted in a printed summary of current rules and distributed to the Committee. The staff lawyer then conducts a follow-up as necessary to determine subsequent agency compliance. If the agency disagrees with the staff comment or proposed solution and the staff objection is of a substantive nature, the matter is printed in the Committee summary and is orally brought to the attention of the Committee at its next meeting for Committee action and the agency is given an opportunity to present its views. The Committee then may act by vote or Committee consensus on the staff objection and recommendation. If the agency did not attend the meeting it is notified of the Committee's recommendation, request, or objection. Follow-up is then conducted as necessary by the Committee staff to determine agency compliance.

Objections generally fall into three major categories: (1) "Substantive" objections are that the agency lacks statutory authority for the proposed rule, the rule improperly interprets the language of the statute being implemented, the rule is unnecessary to give effect to the statute implemented, or that the rule has not been adopted in substantial compliance with the procedural requirements of the Administrative Procedure Act. A review of those objections made by the Committee during the biennium covered by this Report has been included below in this part. (2) A second category of objections raised by the staff relates to such matters as any improper citation to the authorizing statute or the statute being implemented (although both such statutes may in fact exist) improper repetition of statutory language in rules, ambiguous language and weak rationale for the rule. Objections of this type raised by the staff may be brought to the Committee's attention if the agency disagrees with the objection or recommendation of the staff, depending upon the severity of the violation and the nature of the agency response. (3) A third category, including such matters as grammatical errors, spelling and typing errors, etc., are usually brought to the attention of the agency so that they may be corrected but are hardly ever brought to the attention of the Committee for any purpose.

In the great majority of cases in which staff objections were raised to rulemaking errors the agencies have agreed and remedied the staff objection by canceling the rulemaking proceeding altogether, canceling the rulemaking proceeding and rule objected to and renoticing the rule in a different form, by amending the proposed rule in the subsequent notice of adoption, or by correcting minor errors in the ARM replacement pages. In most cases too of Committee objections, the agencies involved responded positively to the Committee objection. While agencies occasionally disagreed strenuously with staff objections, in no case did the agency refuse to respond to staff objections. In several instances reviewed below, however, agencies did refuse to implement a Committee request or did not respond in a timely fashion to such a request.

In order to raise the quality of those rules reaching the Committee for its review, the Committee also undertook a program during the biennium covered by this Report to increase the awareness of the public,



legislators, and agency attorneys and administrators of the existence of the Committee, its purpose and duties, and the requirements of the Montana Administrative Procedure Act and agency rulemaking in general. As part of this educational effort, the Committee:

- Directed several written memos to agency directors, counsel, and other agency personnel associated with rulemaking on the subject of: statements of rationale contained in notices of proposed rulemaking; reports on litigation pursuant to 2-4-410, MCA; review of agency rulemaking functions generally; and amendments to MAPA enacted by the 47th Legislature (all memos to agencies included in Appendix A);
- Directed notices to all Montana legislators drawing their attention to the promulgation of significant rules of general concern or other significant actions affecting the rulemaking process;
- Instructed its staff to send copies of rules promulgated primarily for the purpose of implementing new legislation to the prime legislative sponsor(s) of the bill(s) involved. Fifty-one such letters were mailed by the staff between July 1981 and December 1982;
- Prepared a brochure for distribution to legislators, their constituents, and interested persons describing the rulemaking process and legislative oversight of the process; and
- Directed the staff to present information on the rulemaking process at the orientation session for freshman legislators.

As previously noted, the responses of administrative agencies to objections raised by the staff were, in most cases, agreement with the staff objection and agreement to take corrective action. In relationship to the number of rules reviewed by the Committee's staff, only a limited number of objections raised by the staff were recommended to the Committee for action by the Committee. Listed below are those rules upon which Committee action was taken, listed by the number of the MAR Notice of proposed rulemaking, the Committee objection or other action taken, and a summary of any agency response.

Substantive Committee Actions/Objections to  
Proposed Rules and Agency Responses  
January, 1981 - December, 1981

1. MAR Notice No. 36-21. Board of Land Commissioners. Surface licenses. The Board proposed to adopt rules governing leasing of state lands for cabin sites as well as other purposes. The Committee requested that the Board reconsider its rules which would make existing leases subject to a bidding system, which could increase the cost of current leases considerably and make leases forfeit their improvements on the leased property. The Board agreed not to adopt the rule pending legislative action but indicated it intended to increase rents in any event.
2. MAR Notice No. 10-120-2. Montana Historical Society. Cultural and aesthetic project grants. The Committee requested that a hearing be held on proposed rules which would establish a qualification system for those persons or organizations applying for the state grants.
3. Emergency Rule Amendment. Board of Dentistry. Examinations given by Board members. The Committee objected to the use of emergency rulemaking procedures for rule amendments justified by "the energy crisis" and the "time and money" spent by examinees to take an examination, as not being within the "imminent peril" standard required for the use of emergency rulemaking procedures by 2-4-303.
4. MAR Notice No. 10-120-2 and 10-120-5. Montana Historical Society. Cultural and aesthetic project grants. The Committee objected to certain language in the proposed rules which could be interpreted as purporting to preclude a legislator from introducing an appropriation bill to fund a project unless it was first presented to the Society for ranking, relative to other proposals needing appropriations, and requested that stronger language be inserted requiring the presentation of all grant proposals to the Legislature. The Society agreed not to adopt the rules.
5. MAR Notice No. 18-36. Department of Highways. Single-trip permits. The Committee objected to proposed rules implementing a Department program of single-trip variances to gross vehicle weight



limitations on the grounds that 61-10-121 contains no express rulemaking authority. The Department adopted the rules, claiming implied rulemaking authority.

6. MAR Notice No. 20-3-5. Department of Institutions. Private alcohol treatment programs. The Committee objected to several proposed amendments based on the Department's agreement that they lacked express statutory authority and requested changes in several other rule amendments. The Department complied with the Committee requests.
7. MAR Notice No. 8-37-1. Milk Control Board. Minimum retail price of milk. The Committee objected to the failure of the Board to follow the rulemaking procedures required in 81-23-302(4) and (15) and requested that the Board renote the proposed rules and properly follow the statutory procedure. The Board complied with the Committee's request.
8. MAR Notice No. 24-9-5. Human Rights Commission. Dismissal of complaints on matters also pending in court. The Committee objected to the Commission's reliance on statutes containing no express rulemaking authority and requested the Commission to delete a citation to 49-3-303, as authority. The Commission complied with the Committee's request.
9. MAR Notice No. 26-2-38 and 26-2-239. Board of Land Commissioners. Leases for metalliferous minerals and gems; leases for uranium and other fissionable material. Based upon the Board's agreement that it lacked express authority for rules, the Committee objected to the adoption of a Board "policy" without rulemaking authority. The Board representative stated that the policy would be adopted nevertheless.
10. MAR Notice No. 44-2-26. Secretary of State. Ethics opinions and advisory commission. The Committee objected to certain provisions in 10 separate rules and requested that they be eliminated or redrafted. The Secretary of State complied with a majority of the Committee's requests.
11. MAR Notice No. 10-3-49. Board of Public Education. Requirements for receipt of high school equivalency certificate. The Committee

pointed out to the Board that there was no express statutory authority for any of the current rules on GED testing or equivalency certificates contained in 20-2-121, but determined not to object to the existing rule or proposed amendment because it did not want to call into question the legality of certificates already issued. The Committee recommended that the Board introduce legislation in the next legislative session.

12. MAR Notice No. 4-2-68. Department of Agriculture. Pesticides. The Committee cautioned the Department about use of the summary notice procedure allowed by MAPA before the proposed rules themselves had actually been drafted and requested the Department to hold informational hearings on the final draft of the proposed pesticide rules.
13. MAR Notice No. 4-2-68. Department of Agriculture. Regulation of endrin. The Committee requested that if the Department determines not to prepare an environmental impact statement on the proposed rules, that it then prepare an economic impact statement in accordance with the requirements of 2-4-405, MCA. Because an environmental impact statement was written, no economic impact statement was prepared.
14. MAR Notice No. 4-2-71. Department of Agriculture. Crops insured by hail insurance. The Committee requested that inasmuch as the law grants rulemaking authority for hail insurance rules to the Board of Hail Insurance and not to the Department of Agriculture, that the Board and not the Department propose and adopt the contemplated rules. The Board and Department complied with the Committee's request.
15. MAR Notice No. 8-18-14. Electrical Board. Definition of "maintenance" experience as a licensing prerequisite. The Committee objected to the refusal of the Board to allow certain applicants to take a licensing examination, objected to the Board's proposal of a rule limiting the application of a remedial statute, and requested the Board join the Committee in initiating litigation to resolve the legality of the rule. The Board allowed some applicants to take the test but adopted the rule nevertheless.
16. MAR Notice No. 8-18-15. Electrical Board. Limitation on employment of electricians by



contractors. The Committee requested the Board to hold a public hearing on a proposed rule which would limit the number of master electricians which could be employed by a contractor. A hearing was held in accordance with the Committee's request.

17. MAR Notice 4-2-73. Department of Agriculture. Operating procedures of the Alfalfa Seed Committee. The Committee found a lack of express statutory authority for the Department to adopt rules for the Committee and recommended that the Department seek express authority from the 48th Legislature for the adoption of the rules. The Committee objected to rules providing a minimum penalty as being contrary to the statutory penalty. The penalty provision objected to was not adopted by the Department.
18. MAR Notice 44-3-10-16. Commissioner of Political Practices. Rules implementing the Montana Lobbyist Disclosure Act. The Committee recommended that seven of the proposed rules be amended in a specified manner to more accurately reflect the decision of the Supreme Court in Montana Automobile Association v. Greely, et al. The Commissioner implemented some of the Committee's recommendations.
19. MAR Notice 44-2-26. Secretary of State. Agency filing fees. The Committee recommended to the Secretary that filing fees charged to agencies for publication of notices in the MAR be reduced from \$20.00 to \$13.50 per page. The Secretary complied with the Committee's request.
20. MAR Notice 8-58-18. Board of Realty Regulation. Trust account requirements. The Committee objected to a rule which would allow brokers to maintain earnest money payments in interest-bearing accounts with interest on the account payable to the broker. The Board adopted the rule over the objection of the Committee.
21. MAR Notice 16-2-235. Department of Health. Certificates of need. The Committee requested that the Department delay the adoption of certain rules implementing the state certificate of need law and that if the Department did thereafter adopt the proposed rules that it allow more comment periods on requests for certificates of

need and that it follow the intent of the Legislature in exempting private physicians' and dentists' offices from coverage by the rules. The Department has delayed adoption of the rules in accordance with the Committee's request.

22. MAR. 10-3-66. Board of Public Education. External Diploma Program. The Committee objected to a lack of authority for seven proposed rules of the Board which would establish the external diploma program. The Committee requested that the Board delay the adoption of the rules pending legislative action on a bill requested by the Board to authorize these rules and the rules establishing the GED/High School Equivalency program. The Board agreed to delay the adoption of the rules.

#### PART IV

##### Legislation Recommended by the Committee

In the course of reviewing agency rules during the period covered by this Report, the Committee frequently discussed the Montana Administrative Procedure Act and the Committee's statutory authority, the number and quality of agency rules, and the methods used in other states to adopt and review administrative rules. To assist the Committee in its deliberations of ways in which MAPA might be amended to improve the rulemaking process, the Committee staff conducted research into the operations of the California Office of Administrative Law, the law of several other states providing for the sunset of administrative rules, and the 1981 revisions to the Model State Administrative Procedure Act. The Committee has recommended 12 bills intended to contribute meaningful procedures to the method of adoption and review of administrative rules. In several instances the Committee has relied upon the provision of other states' laws or the Model Act in proposing amendments to MAPA.

#### A

##### The Standard of Necessity for Administrative Rules

##### LC 9 (Appendix D)

Current standards set out in 2-4-305(6) for the validity of rules require that all rules be



"reasonably" necessary to effectuate the purpose of the statute." Courts called upon to apply this standard have made a determination of the reasonable necessity for a rule in the same manner as determining whether the rule<sup>11</sup> is authorized and not in conflict with the statute.

Review of the operations of the California Office of Administrative Law showed that one of the five criteria for approval of a rule by that office is "whether a rule is necessary, as demonstrated by the record of the rulemaking proceedings" (p. 3, Committee memorandum on the California Office of Administrative Law, attached as Appendix B). To implement this criteria, California statutes require that every agency must transmit the entire rule adoption file regarding a particular rule to the California office, which then has 30 days upon receipt of that file in which to review the rule and the rulemaking record, compare the rule to the statutory authority or criteria, and either approve or veto the rule.

The Director of the California Office of Administrative Law informed the Committee staff that the criteria requiring a rule to be necessary is the criteria most often violated by agencies of California state government and the criteria most often used by the Office to disapprove agency rules (pp. 5 and 6, Appendix B). In Montana, it has become clear since the district court's decision in the Montana Taxpayers Association v. The Department of Revenue that a legislative committee may not disapprove rules as could an office of the executive branch of state government, such as the California Office of Administrative Law. There is no similar constitutional impediment, however, to a legislative committee advising agencies whether proposed rules comply with statutory criteria and no apparent constitutional impediment to the giving of some legal effect to the advice of that committee. The Committee therefore intends that an objection to a rule under LC 324 on the grounds that the rule is not "reasonably necessary to implement the provisions of the statute" have the effect of shifting the burden of proof of the validity of the rule as provided for Committee objections generally in LC 324 (Appendix M). The Committee may also advise an agency as to whether the reasonable necessity for a rule is supported by the rulemaking record but that advice, if not stated as an

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<sup>11</sup> See, Board of Barbers v. Big Sky Barber College, \_\_\_ Mont. \_\_\_, 626 P.2d 1269 (1981).

objection under the provisions of LC 324, would not have the effect of shifting the burden of proof to the agency promulgating the rule.

As the bill states, the Committee intends that the rulemaking record show that the rule is "reasonably" necessary to give effect to the statute. Under this language it should make no difference that opponents present testimony opposing proposed rulemaking action, as long as there is other record evidence to show that the rule is necessary. As to those parts of the rule which must be supported by record evidence, the Committee again emphasizes that the standard is one of reasonableness and therefore does not intend that an agency must find support in its record for every word of a proposed amendment or new rule, or the repeal of every word of a current rule. It is sufficient if the general purpose and effect of a rule is shown to be "reasonably necessary". Clearly, however, a showing that a rule is reasonably necessary cannot validate a rule for which there is no express or implied statutory authority, as required by 2-4-102(11), nor validate a rule which otherwise violates the standards of 2-4-305.

## B

### Poll of the Legislature to Determine Legislative Intent

#### LC 10 (Appendix E)

There were no polls of the Legislature to establish legislative intent under the provisions of 2-4-403 and 2-4-404 taken by the Committee in the biennium covered by this Report. On several occasions the Committee was requested to use or considered using the poll but on those occasions the current statutory language made the use of the poll impossible or inadvisable. Several times the Committee was requested to poll the Legislature to determine its intent to authorize adopted rules, whereas 2-4-403 allows a poll to be taken only on proposed rules. The primary purpose of the Committee bill on this subject is therefore to allow a poll to be taken on any rule adopted or amended within two years of the Committee request. Several other amendments have also been included to clarify the current law as to how legislators may make objections to the Committee about rules, and whether the Committee may, like the agency promulgating the rule, state a position on the validity or invalidity of the rule in the polling questionnaire.



C

Direct Mailing of Rulemaking Notices

LC 17 (Appendix F)

There are currently two ways in which agencies notify interested persons of proposed rulemaking. Section 2-4-302(2) requires that the notice be published in the Montana Administrative Register (MAR) and that a copy of the rulemaking notice be mailed to persons who have requested it. Testimony before the Committee and comments by Committee members frequently reflected the view that publication itself, while necessary to serve as legal notice, is insufficient as a practical matter to notify many persons of the rulemaking proceedings of an agency because few interested groups and fewer individuals without government or legal affiliation subscribed to the MAR. In those cases in which a trade or professional society does not subscribe to the MAR and, for whatever reason, has not requested that a copy of the notice be mailed to it, a substantial number of affected persons is without notice of the proposal. The Committee therefore recommends a bill to require direct mailing of notices of rulemaking proceedings to trade, industrial, and professional groups affected by agency proposals. Agency rulemaking costs will clearly increase under this requirement but the Committee believes that public notice of, and the ability to participate in, the rulemaking process justifies any reasonable increase in those costs.

D

Maintenance of the ARM By County Offices

LC 19 (Appendix G)

At various Committee meetings, representatives of the Secretary of the State reported to the Committee that there is a lack of uniformity in county offices in the manner in which the Administrative Rules of Montana are maintained by the provisions of 2-4-313. A poll of county offices conducted by the Secretary of State's Office confirmed this lack of uniformity and showed so little use of the ARM in some county offices that changes were indicated in the number of ARM sets available to the county and the offices in which those sets would be kept. LC 19 would therefore require the keeping of only one copy of the ARM in a county office to be designated by the Commissioners but provides for

one additional copy to be sent to the Commissioners upon their request. Another amendment in LC 19 reduces the number of copies provided to the Legislative Council from three to two.

## E

### Contemporaneous Grant of Rulemaking Authority

#### LC 23 (Appendix H)

Section 2-4-102(11) requires that every rule adopted by each agency covered by MAPA be authorized by express or implied statutory authority to adopt rules. Under current law, a grant of rulemaking authority can be set out in its own statutory section, combined in the statute implemented by the rule, or it may be found in a codification instruction. Codification instructions are written for bills adding new statutory sections of agency duties to existing parts or chapters of the MCA, in part to physically locate the new section within existing portions of the MCA, but primarily to apply existing provisions of law to the new statute. In the case of rulemaking, a codification instruction will have the effect of applying rulemaking authority granted by a previous Legislature to new agency duties enacted by a subsequent Legislature. LC 23 eliminates the use of codification instructions as a means of granting agencies rulemaking authority, and goes even further by requiring that express grants of rulemaking authority for new agency duties required by amendment of statutory sections be granted contemporaneously, or in the same bill, with the amendment. Agencies proposing rules would be required to identify the rulemaking authority in the notice of proposed rulemaking.

## F

### Economic Impact Statements

#### LC 64 (Appendix I)

In the biennium covered by this Report, the Committee considered requests for economic impact statements on four rule proposals: the Department of Agriculture's pesticide rules relating to the use of endrin; the Public Service Commission's rules relating to the cost of municipal water service; the rules of the Department of Social and Rehabilitation Services relating to reimbursement for nursing home construction costs; and



the rules proposed by the Board of Morticians concerning cost disclosure and continuing education. In connection with these requests, the Committee identified several problems with 2-4-405. First, the current statute allows no choice in what matters are to be included in the economic impact statement. Secondly, it can be argued strongly that any request for an economic impact statement under 2-4-405 must be sent to the agency prior to any rulemaking hearing and in sufficient time to allow the writing of the statement within the agency's own time frame for adopting the proposed rule, as the statute does not currently provide for suspension of rulemaking then in progress.

The amendments proposed by the Committee in LC 64 would speak to both of these identified problem areas by giving the Committee a broad choice of matters to be included in the economic impact statement, and by giving the Committee the power to suspend rulemaking proceedings then in progress, subject to the power of the Governor to approve an economic impact statement and allow rulemaking to continue. The list of economic factors to be included in the impact statement are taken from Section 3-105(b) of the 1981 Revisions to the Model State Administrative Procedure Act.

## G

### Control of Rulemaking By Joint Resolution

#### LC 321 (Appendix J)

On March 18, 1982, District Judge Gordon Bennett issued his order and opinion in the case of The Montana Taxpayers Association v. The Department of Revenue, holding the legislative authority to direct by joint resolution the amendment or adoption of administrative rules to be unconstitutional, as a violation of the doctrine of separation of powers. Speaking to subsection (2) of 2-4-412, Judge Bennett said:

Subparagraph (2) of that section, on its face, unquestionably violates the separation of powers provision of our constitution. It authorizes mandatory legislative rulemaking by joint resolution. As pointed out above, this is a clear invasion of the executive prerogative and lawmaking outside the constitutional process.

Judge Bennett's decision also implies the unconstitutionality of the power of the Legislature to repeal agency rules by joint resolution as well. The decision was not appealed and is now law to be accorded some precedential respect in the First Judicial District. Because the Committee believes the law should be clarified in light of the Court's opinion, it has recommended a bill to provide that legislative requests or advice for rulemaking action be accomplished by joint resolution and that legislative direction, having the force and effect of law, for rulemaking action be accomplished by bill only.

## H

### Joint Resolution Amending the Joint Rule to Conform With LC 321

#### LC 322 (Appendix K)

There are three rules of the Joint Rules of the House and Senate which make reference to the use of joint resolutions to effect administrative rules under 2-4-412. Because 2-4-412 would be amended by LC 321, the joint rules must also be amended to make them consistent with the effects of LC 321. LC 322 amends the Joint Rules to allow the use of a joint resolution to advise or request rulemaking proceedings and allows bills and joint resolutions on rulemaking to be introduced and transmitted at any time.

## I

### Elimination of Agency Reports on Proposed Changes to Statutes Authorizing Rules

#### LC 323 (Appendix L)

Since 1979, 2-4-314 has required that agencies submit a report to the Administrative Code Committee prior to each legislative session indicating the agencies recommendations for legislation to clarify, grant, or eliminate statutory authority to adopt rules. Prior to the 1981 Legislature, the Administrative Code Committee received individual reports from approximately 15 agencies in compliance with this requirement. In 1982, the Committee received a consolidated report for all agencies under the direct authority of the Governor, received a separate report for the Department of Highways, a separate report from the Hard-Rock Mining



Impact Board, but received no report from other executive branch agencies such as the Public Service Division, Office of Public Instruction, and the Secretary of State. Inasmuch as the statute has never been fully complied with and as the Committee has not made substantial use of the reports for the last two bienniums, the Committee recommends that the reporting requirement be eliminated.

## J

### Objections to Agency Rules

#### LC 324 (Appendix M)

As Part IV of this Report shows, the Committee was confronted several times throughout the biennium with agency rulemaking actions taken in spite of Committee objections that a rule or rules were not authorized by, or were in conflict with, the law. By way of solution to those situations and in partial response to the district court opinion in The Montana Taxpayers Association v. The Department of Revenue, the Committee recommends legislation to give a legal effect to objections by the Committee to agency rulemaking. LC 324 is patterned closely after the provisions of section 3-204 of the Model State Administrative Procedure Act, the provisions of which were reviewed by the Committee at several meetings (See Committee Comparison of MAPA and the Model Act, attached as Appendix C), and provides for a shifting of the burden of proof in actions involving the validity of rules once the Committee has objected to a rule and that objection has been printed in the MAR or ARM. The official comments of the National Conference of Commissioners on Uniform State Laws describe this procedure as "a fair compromise between the extremes of authorizing one house of the legislature or a legislative committee to veto, temporarily or permanently, rules issued by an agency, and authorizing a legislative committee merely to recommend to the legislature that it overrule such regulations by statute." LC 324 establishes a procedure whereby the Committee may object to unlawfully adopted rules and, although the rule would remain in effect, the objection would have the effect of lifting the burden of proving the unlawfulness of the rule from a party bringing a legal challenge to the rule and would instead place the burden of proving the lawfulness of the rule on the agency. The effect of the shifting of that burden would be that in doubtful cases, where both the agency

and the challenger of the rule have presented credible proof of validity or invalidity of the rule, the court must rule for the party alleging the unlawfulness of the rule. In this way the agency might still adopt and enforce the rule, but a party challenging its legality would, in the event of an independent appraisal of the rules and an objection by the Committee, be assisted somewhat in his claim that the rule is illegal. Any Committee objection would be published along with the rule in order to notify persons affected by it that the rule is of dubious legality.

Most importantly, a two-step procedure has been required for an objection to have the burden-shifting effect, in order to ensure that the agency is given a fair opportunity to respond to Committee concerns. The objection would first be voted by the Committee and sent to the agency. After an opportunity for the agency to respond and for the Committee to consider the response, a separate vote would then be required to publish the objection in the MAR or ARM, and it is only upon publication of the objection that the burden is shifted to the agency. Under this procedure the agency will be given a clear opportunity to excise the questionable portion of the rule or rules and any failure to do so must be based on a conscious decision by the agency that it both needs the rule and that it can sustain its burden of proof in the event of a legal challenge. In this regard the official comments of the Commissioners on Uniform State Laws to Section 3-204 are highly relevant.

## K

### Requirement to Publish the Fact of the Lack of Legal Effect of a Rule

#### LC 325 (Appendix N)

As part of the review process of every rule the Committee and its staff must determine whether a rule is authorized by "express" authority to adopt rules or only by "implied" authority to adopt rules. This requirement springs from the definition of a rule contained in Section 2-4-102(11) of MAPA. The difference between "express" and "implied" statutory authority for a rule is significant, for if an agency is expressly authorized by statute to adopt rules, the rules authorized have the force and effect of law and the violation of those rules may be punished by civil or criminal penalties, or other penalties such as



forfeiture of a state granted license, forfeiture of state grant moneys, etc. If the authority to adopt a rule is only implied in the law, the rule does not have the force and effect of law but has the status of "advice" only and the state may not punish a violation of the rule or in any way attempt to enforce compliance with its provisions. The current requirement for the form in which rules are to be adopted makes no distinction between the form or appearance of rules adopted under express authority and rules adopted under implied authority. There is therefore no difference on the face of a rule between rules which must be followed as a matter of law and rules which are only advice and may be followed or not followed as a person sees fit. LC 325, based on generally upon the provisions of Section 3-109 of the Model State Administrative Procedure Act, requires an agency to publish in the history notes of every rule authorized by implied authority a statement saying that the rule is only impliedly authorized by statute and therefore does not have the force and effect of law. The bill is recommended by the Committee because of a concern that persons subject to agency rules must otherwise rely upon agency representations as to whether or not a rule must be complied with as a matter of law.

## L

### Committee Review of Rules Adopted Prior to April 14, 1975

#### LC 520 (Appendix O)

When the Montana Administrative Procedure Act was adopted by the First Extraordinary Session of the 42nd Legislative Assembly administrative agencies which had previously not been covered by a single uniform requirement for the filing and publication of rules were given 60 days following the effective date of the Act (December 31, 1972)) to file a certified copy of all previously adopted rules with the Secretary of State. Any rule not so filed was void and of no effect. Under this provision, hundreds of rules were filed with the Secretary of State's Office and the procedural statutes under which they were originally adopted were repealed and replaced by MAPA. Three years later, after the adoption of numerous rules and rule amendments under the new Administrative Procedure Act, the Legislature created the Administrative Code Committee on April 14, 1975, and from that date on the Committee was required to review all rules proposed by

administrative agencies. Because the adoption of many rules and the adoption of MAPA preceded the creation of the Committee, there are many administrative rules which have never been reviewed by the Committee. The purpose of LC 520 is to subject those rules to Committee review. Under LC 520, the Committee would be able to poll the Legislature in accordance with LC 10, if that bill is passed and approved, on any "old" rules amended in the last two years, could advise any agency of the illegality of any rule, and must make a report of its review to the Legislature within four years.



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(406) 449-3064

### ADMINISTRATIVE CODE COMMITTEE

TO: Agency Counsel and Other Agency Personnel Associated  
with Rulemaking Function

FROM: Administrative Code Committee of the Montana Legislature

RE: Amendments to the Montana Administrative Procedure Act Enacted  
by Chapters 381 and 591, L. 1981, and Amendments to Model Rules

DATE: September 24, 1981

On October 1, 1981, several significant changes to those portions of the Montana Administrative Procedure Act relating to administrative agency rulemaking will become effective. These changes, passed by the 47th Legislature in House Bills 38 and 74 (Ch. 591 and 381, L. 1981, respectively) were recommended to the 47th Legislature by the Administrative Code Committee in the hope of clarifying current statutes and practices, improving citizen knowledge of the rulemaking process, and relieving state administrative agencies of some unnecessary burdens. The Committee urges all personnel involved with rulemaking to read the language of these changes carefully and because of the importance of certain of the amendments, the Committee wishes to bring to your attention the several specific provisions outlined below.

1. 2-4-405 has been amended to require that certain differences between the rules as proposed and as adopted be explained in the agency's statement of reasons for adoption of the rule. The Administrative Code Committee's Biennial Report to the 47th Legislature explained the basis for this change in the following language:

The Committee is aware of several instances in which agencies have proposed several new or amended subsections of a rule for adoption but have in fact adopted only one or less than all of the amendments proposed for adoption. In such a case the Committee recommends legislation which would require the agency to explain that it is not adopting all of the amendments originally proposed. The legislation recommended by the Committee is not intended to authorize by implication the adoption of rules which are substantially different from those rules as proposed and therefore outside the scope of the notice of proposed rulemaking. The amendment is intended to speak only to those situations in which the adopted rule is still within the scope of the original notice of proposed rulemaking, but has adopted less than all of the changes originally proposed.

Agency Counsel  
September 24, 1981  
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In accordance with this language, it is not the purpose of the Administrative Code Committee and therefore this legislation to authorize the actual adoption of rules that differ substantially and materially from the rules as proposed. Under a reasonable reading of other provisions of the Administrative Procedure Act and under the Committee's continuing policy, the language of rules to be adopted must still be reasonably within the scope of the notice of proposed rulemaking or the rulemaking process must be started anew.

2. 2-4-410 has been created by section 6 of Ch. 381 to require the filing of certain documents involving litigation under MAPA, with the Administrative Code Committee. There are three principal reasons for this requirement: 1) to create a central filing system of documents, principally unreported judicial opinions, relating to MAPA which may be made available to all administrative agencies; 2) to notify the Committee of the judicial construction of MAPA provisions; and 3) to allow the Committee to participate in cases in which significant issues involving the interpretation of MAPA have been raised. The Committee believes that full compliance with this section will benefit equally all those agencies utilizing the Act. Beginning October 1, 1981, agency reports of litigation involving MAPA should be sent to the following address:

Administrative Code Committee  
Room 138  
State Capitol  
Helena, Montana 59620

3. 2-4-302(2) requires an agency to mail individual notices of rulemaking to those persons requiring the same within three days of publication in the Montana Administrative Register. Again, this provision is intended to standardize a variety of procedures between agencies.

4. 2-4-302(7) requires hearing officers at rulemaking hearings to read aloud the "notice of function of the Administrative Code Committee", published in the Montana Administrative Register, to those persons in attendance.

5. 2-4-305(4) requires that rules of an agency implementing the policies of a governing board make a citation to that policy. Note that both the policy and the implementing rule must be supported by independent statutory authority.

6. Substantial changes have been made by Ch. 591 in the method prescribed by 2-4-307 by which agencies may adopt federal rules and other material by incorporation by reference. Agencies adopting large amounts of federal material by reference are particularly urged to read these new provisions carefully.

7. Agencies should also note that as a result of the statutory changes made by House Bills 38 and 74, changes have been proposed



Agency Counsel  
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by the Department of Justice to several of the Model Rules required by 2-4-202. A summary of the proposed changes is published in MAR Notice 23-9-59, at page 802 of 1981 MAR Issue No. 15. In accordance with the schedule to be used by the Department of Justice, the proposed changes to the Model Rules will become effective sometime after October 1, 1981.

In order to decrease the possibility of successful legal challenges to the agencies' adoption of the Model Rules and to provide for maximum public notice of the same, the Administrative Code Committee recommends that all agencies intending to utilize the Model Rules readopt those rules by following the rulemaking procedure applicable to their agency. In most cases this procedure will require that the provisions of 2-4-307, MCA, as amended by Ch. 591, L. 1981, and ARM 1.2.211 be followed.

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### ADMINISTRATIVE CODE COMMITTEE

TO: Agency Counsel and Other Agency Personnel Associated With  
the Rulemaking Function

FROM: Administrative Code Committee of the Montana Legislature

RE: Review of Agency Rulemaking Functions

DATE: January 26, 1982

At its meeting on January 22, 1982, the Administrative Code Committee reviewed the requirements of subsection (6) of §2-4-305, MCA, that a rule be "reasonably necessary to effectuate the purpose of the statute" and voted to express its concern to all administrative agencies adopting rules under the Montana Administrative Procedure Act, that not all agencies are demonstrating the necessity for a rule in the agency's rulemaking record. The Committee believes that this subsection could be interpreted to require that agencies demonstrate necessity for rules at the time of the making of the rulemaking record and, in fact, believes that interpretation is desirable because of the opportunity it affords to persons interested in the rulemaking process to discover the agency's factual basis for making the determination of necessity.

The Committee also voted to suggest to agencies that following adoption of a proposed rule, the agency notify by letter each individual who testified at any rulemaking hearing or submitted written comments to the agency, and tell each of those persons whether the rule in question was adopted and the reason(s) for the agency action.

The Committee intends to introduce legislation in the 1983 Legislature specifically requiring that the demonstration of necessity for a rule be a matter contained in the agency rulemaking record.

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## ADMINISTRATIVE CODE COMMITTEE

TO: Agency Counsel and Other Agency Personnel  
 Associated with Rulemaking Function

FROM: Administrative Code Committee of the Montana  
 Legislature

RE: Sufficiency of Agency Statements of Rationale  
 Contained in Notices of Proposed Rulemaking

DATE: July 29, 1982

At its meeting on July 27, 1982, the Administrative Code Committee reviewed with particular scrutiny several statements of rationale for proposed rules. Such statements are required to be included in all notices of proposed rulemaking, published in the Montana Administrative Register under the provisions of the Montana Administrative Procedure Act, by virtue of the requirements of section 2-4-302(1), MCA. Upon review of several statements of rationale and comparison of those statements with the text of the accompanying proposed rule, the Committee has become concerned that some agencies are tending to abbreviate the required statement of rationale to the point where it no longer accurately reflects what must be the rationale for the proposed rule, is no longer helpful to the reader, and no longer complies with the purpose of the statutory requirement. This is especially true of statements of rationale that merely restate the text of a proposed rule or merely include a statement to the effect that the rule is being proposed to "more equitably regulate" the subject of the proposed rule, or other similar language.

For this reason, the Committee unanimously voted to caution agency personnel drafting notices of proposed rulemaking that the statement of rationale required by section 2-4-302(1), MCA is legally and logically a necessary part of the notice, and that abbreviation of the statement not only is uninformative to the public and the Committee, but may, in the event of a legal challenge to the rule, result in invalidation of the rule just as if the statement of rationale had been omitted all together (see, Jersey Creamery, Inc. et al. v. Milk Control Division, Lewis and Clark County No. 42555, August 24, 1978).

The Committee therefore recommends that agencies pay careful attention to statements of rationale and that the statements be drafted to clearly demonstrate agency reasoning in accordance with the foregoing considerations.

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## ADMINISTRATIVE CODE COMMITTEE

TO: Legal Counsel, Executive Branch Agencies  
 FROM: Administrative Code Committee  
 RE: Report of Litigation Pursuant to 2-4-410, MCA  
 DATE: November 29, 1982

In 1981, the Administrative Code Committee sponsored legislation in the 47th Legislature to require agencies conducting litigation in which an interpretation of any provision of the Montana Administrative Procedure Act is at issue to report that litigation to the Administrative Code Committee. The bill was enacted into law and the reporting requirement is now codified as 2-4-410, MCA ("Report of Litigation").

The Committee's 1980 Report to the 47th Legislature shows that the purpose of the statutory reporting requirement is to allow the Committee to follow or participate in litigation and to establish a central filing of unreported judicial decisions which the Committee and its staff may then use to advise agency lawyers of interpretations of the Act's provisions and to serve as a basis for amendment of statutes which have been interpreted in a manner contrary to legislative intent.

To this date, the Administrative Code Committee has not yet received a report from any executive agency. Agency attorneys occasionally call the lawyers of the Legislative Council, who serve as the Committee staff, for advice and interpretations concerning various provisions of MAPA and, as there have been no cases reported to the Committee, the staff must speculate as to interpretation of provisions for which there have been no reported cases.

At its meeting on November 18, 1982, the Committee reviewed the purposes of the reporting requirement and the fact that no reports have yet been filed. The Committee determined that there are good reasons to continuing the reporting requirements. The Committee therefore wishes to draw the attention of agency counsels to the existence of the reporting requirement and urge that any litigation falling within the terms of 2-4-410 be reported on a continuing basis to the Committee at the following address:

Administrative Code Committee  
 Room 138, State Capitol  
 Helena MT 59620

DSN:ee



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## ADMINISTRATIVE CODE COMMITTEE

TO: Administrative Code Committee

FROM: David S. Niss, Counsel to the Committee *DSN*

RE: Review of Administrative Rules by the California Office of Administrative Law

DATE: June 29, 1981

At the conclusion of the Administrative Code Committee meeting held on April 17, 1981, the Committee discussed the process of agency rule review in other states and how those states avoid constitutional difficulties concerned with the veto or suspension of agency rules by a legislature or legislative committee. The Committee was advised during that Committee meeting that the State of California had recently created an Office of Administrative Law which is an executive branch agency having statutory authority to veto agency rules. Several members of the Committee requested that the Committee staff report on the functions and effectiveness of that office. This memorandum contains the requested information and is based upon a review of Chapter 3.5 of the Annotated California Codes ("Office of Administrative Law") and a discussion with the Department Director of the California Office of Administrative Law, Mr. Carl Poirot.

## I. History of the Office of Administrative Law

Prior to the inception of the California Office of Administrative Law, the administrative agency rules published in the compilation now known as the California Administrative Register, were simply filed with the California Secretary of State and became effective upon publication. While the legislature had the authority, by a two-thirds vote of each house, to repeal an administrative agency regulation, there was no one, centralized agency or committee designated to review regulations promulgated by executive agencies.\* In 1979, one bill was introduced to create the Office of Administrative Law as an independent regulatory agency within the executive branch, having authority to veto proposed regulations of all other executive branch agencies. Another bill was introduced to reduce the two-thirds majority required of each legislative house for a

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\* As the previous staff study included as Appendix "A" to the Administrative Code Committee's Report to the 47th Legislature points out, most states provide a review mechanism of some sort. However, California is apparently the only state that has created an executive agency especially for the review of regulations.

Administrative Code Committee  
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repeal of an administrative agency regulation to a simple majority. These bills competed for legislative time and attention, as each bill was thought to be the exclusive manner of solving a proliferation of agency regulations. The bill creating the Office of Administrative Law won out over the bill reducing the majority required for repeal of agency rules, and was passed as section 1, Chapter 567 of the 1979 Laws of the State of California, effective July 1, 1980.

## II. Establishment of the Office of Administrative Law

In establishing the Office of Administrative Law, the legislature made the following findings of fact and declaration:

The Legislature finds and declares as follows:

(a) There has been an unprecedented growth in the number of administrative regulations in recent years.

(b) The language of many regulations is frequently unclear and unnecessarily complex, even when the complicated and technical nature of the subject matter is taken into account.

(c) Substantial time and public funds have been spent in adopting regulations, the necessity for which has not been established.

(d) There exists no central office in state government with the power and duty to review regulations to ensure that they are written in a comprehensible manner, are authorized by statute and are consistent with other law. [Section 11340, Annotated California Codes.]

It is significant to note that in establishing the Office of Administrative Law, the California Legislature declared a specific intention that the purpose of the office was to reduce the number of administrative regulations. The statement of intent reads as follows:

The legislature therefore declares that it is in the public interest to establish an Office of Administrative Law which shall be charged with the orderly review of adopted regulations. It is the intent of the Legislature that the purpose of such review shall be to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted. It is the intent of the Legislature that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations. [Section 11340.1, Annotated California Codes.]

Additionally, section 11340.2 of the California statutes specifies that the Office of Administrative Law is to be under the direction and control of a director who is to be appointed by the Governor, subject to the confirmation of the State Senate, and whose term is to be



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coterminous with that of the Governor's but who does not serve at the pleasure of the Governor. The Office of Administrative Law is required to run on a billing system under which the Office bills each state agency to which it provides services, for reimbursement of the cost of providing those services to that particular agency.

### III. Function of the Office of Administrative Law -- Ongoing Rule Review

One of the functions of the Office is to review those rules promulgated under the California rule adoption laws. Adoption of administrative agency rules in California is accomplished under a process similar to that required by the Montana Administrative Procedure Act. First, a notice of proposed action is published in the California Administrative Register. The agency must state its justification for the proposed rule in that notice of proposed rulemaking. An established period of time is allowed for submission of written comments or hearing on the proposed rule. If the agency adopts the proposed rule, it must then file a notice of adoption of the particular rule, along with a statement of responses to comments received during the rulemaking process. The rule is effective upon publication in the California Administrative Register.

Under the review procedure established in the statutes for the Office of Administrative Law, the following schedule must be adhered to:

- 1) After taking the necessary administrative steps to adopt a rule (notice, hearing, responses to comments, and notice of adoption), the agency must transmit its entire rule adoption file, including all studies and reports or data and other factual information upon which the rule is based, and a transcript, recording, or minutes of any public meeting conducted, to the Office of Administrative Law.

- 2) The Office of Administrative Law then has 30 days from the date of receipt of the agency's rulemaking file in which to determine the following:

- a) whether the rule is necessary, as demonstrated by the record of the rulemaking proceedings;
- b) whether there is legal authority for the rule;
- c) whether the rule is clear in its meaning;
- d) whether the rule is consistent with existing laws;
- e) whether the rule properly interprets or implements a statute or court decision.



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3) If the rule is disapproved the agency may not adopt it in the form received by the Office of Administrative Law but may redraft it and resubmit it to the Office. No notice and hearing need accompany the resubmittal to the Office of Administrative Laws if the redrafted rule is still within the scope of the original proposal and makes no substantial changes from that original proposal.

4) The Governor is given the authority to overrule any disapproval by the Office of Administrative Law, within 30 days after the decision of the Office.

5) Any rule finally approved by the Governor or the Office of Administrative Law is then transmitted to the Secretary of State for publication in the California Administrative Register and, upon publication, the rule attains the force and effect of law.

[Annotated California Codes, sections 11349 through 11349.5]

#### IV. Function of Office of Administrative Law -- Review of Previously Adopted Rules

A second function of the Office of Administrative Law, that of review of rules adopted prior to the inception of the Office, is made necessary because of the creation of the Office of Administrative Law at such a late date. The Office has been in existence in California for approximately a year but the California Administrative Code constitutes approximately 30,000 pages of regulations. For this reason, the California Legislature gave the Office the job of reviewing all of the rules adopted by state agencies prior to the creation of the Office.

Each agency subject to the procedural statutes outlined above specifying the method of rule adoption is required to review and revise its regulations under the following scheme:

1. Each agency is required to submit a plan to the Office of Administrative Law specifying the time schedule, within certain established statutory limitations, within which the agency will review all of its rules and to estimate the cost of that review.

2. The Office of Administrative Law then has the authority to adjust the time schedule and to bind the agency to a schedule for review of all of its existing rules.

3. After an agency has completed the review and revision of its rules, it must transmit those revised rules to the Office of Administrative Law.

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4. The Office then compares those revised rules to the five criteria used to determine the approvability of rules on an ongoing basis (see paragraph III, 2) above), and must, within 60 days of receipt of those agency rules, approve the rules or issue an order to show cause why the Office should not repeal the revised rules.

5. Upon receipt of the order to show cause, the agency promulgating the revised rules must transmit to the Office all documentation demonstrating compliance with the five criteria set out above.

6. If the Office determines that the regulation fails to meet the five criteria, it must issue an order repealing the rule and stating the reasons for its determination.

7. The Governor may, within 30 days of receipt of the order of the Office of Administrative Law, overrule the decision of the Office, and approve the rule for filing and publication.

Essentially, what the foregoing procedure does is to force agencies which cannot establish a documented need for their regulations to go through another adoption procedure to see whether the rule is truly necessary. Even if, on the basis of that adoption procedure, the agency cannot justify the basis for the regulation, it may be repealed by the Office of Administrative Law.

#### V. Appraisal of the California Office of Administrative Law

In discussing with Mr. Poirot the manner in which the Office of Administrative Law is functioning, he seemed generally satisfied with the law under which the Office functions and stated he believed that the figures kept by the Office would show that the Office has had a substantial impact upon the promulgation and adoption of administrative rules in the State of California. Mr. Poirot has supplied these figures to the Committee in the form of quarterly and final reports of the Office, and they show the following:

Between July, 1980 and March of 1981 (the first nine months of operation of the Office of Administrative Law), agencies of the State of California proposed and sent to the Office of Administrative Law 461 regulations. Because of certain statutory exceptions, 424 rules were actually reviewed by the Office. Of these 424 regulations, 96 were emergency rules and 328 were "regular" adoptions.

Of the 424 rulemaking packages reviewed during this period, 32 emergency regulations were returned to the agencies, 61



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of the rules were returned to the agencies in total, and 9 were returned to the agencies in part. Four or five rule disapprovals were overridden by the Governor during this period.

The above figures give the California Office of Administrative Law a rate of disapproval of reviewed regulations equal to the following percentages:

Emergency rules disapproved - 33%

Regular rules disapproved - 21%

Overall rule disapproval rate - 24%

(See Office of Administrative Law chart attached as Exhibit "A".)

Mr. Poirot stated that the figures collected and analyzed by the Office will show that it has had a significant impact on the number of rules submitted for adoption and finally adopted by California agencies. He stated that in the nine-month period between July and March, 1979-1980, compared to the same nine months in the period between July and March, 1980-1981, there was a decline of 36% in the number of regulations submitted to the Office by California state agencies and a decline of 54% in the number of rules adopted by California state agencies (which figure includes both fewer submitted and fewer actually adopted by agencies (See Office of Administrative Law chart attached as Exhibit "B"). Mr. Poirot stated that he believed the decline in the number of regulations submitted is due to the fact that California agencies now know that rules which cannot be fully and adequately documented as to their necessity will be returned by the Office of Administrative Law and disapproved.

The Office of Administrative Law employs 42 full-time employees and has an annual budget of approximately \$1,500,000.

DSN:hm  
Attachments



CHART 1

OAL REVIEW AND DISPOSITION  
OF PROPOSED REGULATIONS  
JULY - MARCH 1980-1981

Type	Number Reviewed	Approved For Filing	Fully Disapproved Regulations	Partially Disapproved Regulations	Percent Disapproved
Emergency	96 <sup>1</sup>	64	32	0	33%
Regular	328	258	61	9	21%
TOTAL	424	322	93	9	24%

<sup>1</sup>Does not include 9 Statutorily Mandated Emergency Regulations. Where a statute mandates the adoption of a regulation as an emergency, OAL does not review it to determine whether an emergency exists (see Government Code Section 11346.1, Finance Code Section 5500.5, and Welfare and Institutions Code Section 114105).

## I. INTRODUCTION

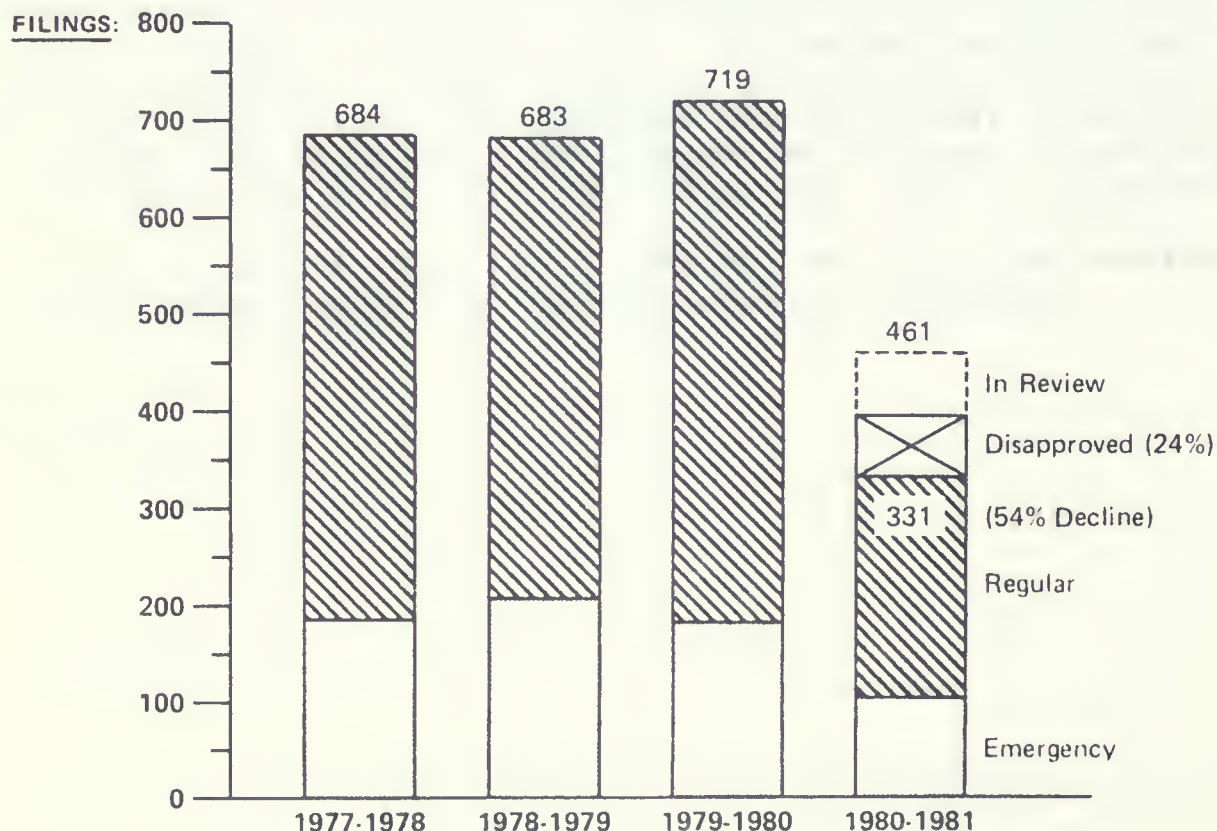
The third quarterly report on the progress toward regulatory reform in California and the activities of the Office of Administrative Law (OAL) highlights three major accomplishments:

1. A 54% decline of new regulations approved in the nine-month period of OAL operation, compared to the same period of the previous year.
2. Launching the first comprehensive evaluation of the 30,000 pages of existing regulations for the repeal of those that are unnecessary, unauthorized or otherwise inconsistent with the law.
3. The publication of the first comprehensive Index to the California Administrative Code.

## II. SHARP DECLINE IN REGULATION GROWTH

The regulation decline rate for the full nine months of OAL operation was 54%, with 331 regulations added to the Administrative Code as compared to 719 in the same period prior to OAL's existence (see graph below). Agencies submitted 36% fewer regulations during this period, with OAL disapproving 24% of those submitted, including 1 out of every 3 "emergency" regulations.

REGULATION GROWTH/DECLINE  
JULY -- MARCH  
1977 -- 1981



ARTICLE I

<u>Model Act Section</u>	<u>Similar MAPA Section</u>	<u>Comparison</u>
1-102	2-3-102, 2-4-102, MCA	<u>Definitions:</u>  "Agency" - Model Act includes agency heads or persons purportedly acting under their authority; excludes political subdivisions of the state.  "Agency action" - Model Act is broader than MAPA; includes performance or failure to perform any duty or function, discretionary or otherwise.  "Agency head" - added by Model Act.  "License" - MAPA adds provision excepting licenses required solely for revenue purposes.  "Order" - added by Model Act.  "Party to agency proceedings" - MAPA adds provision allowing agency to admit any person as a party for limited purposes.  "Party to judicial review or civil enforcement proceedings" - added by Model Act.  "Person" - Model Act adds private organization of any character and another agency.  "Provision of law" - added by Model Act.



<u>Model Act Section</u>	<u>Similar MAPA Section</u>	<u>Comparison</u>
1-102 (cont.)	2-3-102, 2-4-102, MCA (cont.)	"Rule" - Model Act adds suspension of a rule; MAPA adds exceptions 2-4-102(10)(a) through (f).
		<u>"Rulemaking"</u> - added by Model Act.
		<u>"Substantive rules"</u> - added by MAPA.
1-103	2-4-107, MCA	<u>Construction:</u> Model Act provides that it creates only procedural rights.
1-104	No similar provision	<u>Suspension of Act to Avoid Loss of Federal Funds or Services:</u> Model Act permits specific functions of agencies to be exempted from applicable provisions of Act to extent necessary to prevent denial of federal funds or services.
1-105	2-4-201, 2-4-603(2) 2-4-604, MCA	<u>Waiver:</u> Model Act allows waiver by a person of any right conferred by the Act. MAPA allows parties to jointly waive a formal proceeding in a contested case and then use informal procedure under 2-4-604, MCA.
1-106	2-4-201, 2-4-603, MCA	<u>Informal Settlements:</u> Model Act requires agencies to establish specific procedures for attempting and executing informal settlements. MAPA requires agencies to state in rules those informal procedures which are available to any party.

<u>Model Act Section</u>	<u>Similar MAPA Section</u>	<u>Comparison</u>
1-107	2-4-604(5), MCA	<u>Conversion of Proceedings:</u> Model Act provides for conversion of one type of proceeding to another, i.e., informal to formal, so long as no party is substantially prejudiced. MAPA provides for judicial review of informal decisions.

## ARTICLE II

2-101	2-4-306, 2-4-307, 2-4-311 through 2-4-313, MCA	<u>Administrative Rules Editor; Publication, Compilation, Indexing, and Public Inspection of Rules:</u> Model Act provides for an "administrative rules editor" within the executive branch to compile, publish, and index rules. MAPA requires these functions to be performed by the Secretary of State.
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2-102	2-4-103, MCA	<u>Public Inspection and Indexing of Agency Orders:</u> Model Act requires each agency to make available to the public and index all final written orders, removing details required to prevent an invasion of privacy. MAPA requires statements of policy or interpretation to be available for public inspection.
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2-103	2-4-501, MCA	<u>Declaratory Orders:</u> Model Act requires agencies to adopt rules governing declaratory order process; allows persons to intervene as in judicial proceedings; requires agency action within 30 days, and disposition within 60 days. MAPA's similar provision does not address intervention and does not specify a time limit for disposition of petitions for declaratory rulings.
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<u>Model Act Section</u>	<u>Similar MAPA Section</u>	<u>Comparison</u>
2-104	2-4-201, MCA	Required Rule Making: Model Act adds subsections (3) and (4) providing for procedural safeguards and standards to be applied by the agency and requiring agencies to supersede principles of law and policy made in the course of adjudications with rules.
2-105	2-4-202, MCA	Model Rules of Procedure: Model Act is based on Montana section.
ARTICLE III		
3-101	2-4-304, MCA	Advice on Contemplated Rulemaking Prior to Notice of Proposed Rule Adoption: Model Act is substantially similar to 2-4-304, MCA.
3-102	No similar provision	Public Rule-making Docket: Model Act requires rulemaking docket or agenda and assures public access to full rulemaking agenda of an agency and information relevant to the agenda.
3-103	2-4-302, MCA	Notice of Proposed Rule Adoption: Model Act requires entire text of proposed rule to be incorporated in notice of proposed rulemaking. MAPA allows filing and publication of a summary of the proposed rule.
3-104	2-4-302, MCA	Public Participation: Model Act gives interested parties 30 days to submit views whereas MAPA provides 28 days. Model Act adds subsections (3) and (4) concerning duties of presiding officer of an oral hearing and adoption of rules governing oral proceedings.



<u>Model Act Section</u>	<u>Similar MAPA Section</u>	<u>Comparison</u>
3-105	2-4-405, MCA	<p><u>Regulatory Analysis (Economic Impact Statement):</u> Model Act provides such analysis may be requested by the governor, a political subdivision, an agency, 300 people, or the administrative rules review committee. The analysis must include the following unless waived in the request: a) classes of persons affected; b) quantitative and qualitative impacts, economic or otherwise upon the affected classes; c) costs to the agency and effect on state revenues; d) cost-benefit analysis; e) a determination of less costly methods; and f) alternative methods considered and the reasons for rejecting them. MAPA gives the ACC only the authority to request an economic impact statement, which must include three specific topics without the possibility of waiver and allows an agency to state that the formulation of the analysis is impossible. LC 64 would enact provisions similar to the Model Act.</p>
3-106	2-4-305, MCA	<p><u>Time and Manner of Rule Adoption:</u> Model Act adds subsection (d) providing that within the scope of its delegated authority an agency may use its expertise and judgment in adopting rules.</p>
3-107	2-4-305, MCA	<p><u>Variance between Adopted Rule and Published Notice of Proposed Rule Adoption:</u> Model Act adds criteria for determining if a substantial difference exists between a rule as proposed and adopted as follows: (a) whether any different persons affected should have known rule affected their interests; (b) extent to which subject matter and issues in the adopted rule differ from proposed rule; (c) extent to which effects of adopted rule differ from effects which would have occurred if published rule had been adopted. MAPA only requires that if only a portion of a proposed rule is adopted, the agency must state which portion is not being adopted.</p>

<u>Model Act Section</u>	<u>Similar MAPA Section</u>	<u>Comparison</u>
3-108	No similar provision	<p><u>General Exemption from Public Rule-making Procedures:</u> Model Act allows agency to determine that any requirements unnecessary or impractical need not be followed in rulemaking. Within 2 years after adoption of a rule under this provision the administrative rules review committee or the governor may request the agency to follow full rule-making procedures.</p>
3-109	2-4-102(11)(b), MCA	<p><u>Exemption for Certain Rules:</u> Model Act provides an agency need not follow rule-making procedures in adopting "interpretive rules". Fact that rule is non-binding must be published with the rule. Court review of such a rule is entirely <u>de novo</u>. MAPA allows adoption of nonbinding "interpretive rules".</p>
3-110	No similar provision	<p><u>Concise Explanatory Statement:</u> Model Act provides that in determining the legality of a rule the court should consider only the supporting reasons relied on by the agency in its explanation and only those representations of the agency consistent with its explanatory statement. MAPA contains no such express provision.</p>
3-111	2-4-305(3), 2-4-306, 2-4-307, MCA	<p><u>Contents, Style, and Form of Rule:</u> Model Act requires each adopted rule contain text of rule, date of adoption, statement of purpose, references to all rules repealed, amended or suspended by the adoption, citation to the authority for the rule, any required findings, and the effective date of the rule. MAPA requires a citation to the implemented section also.</p>

<u>Model Act Section</u>	<u>Similar MAPA Section</u>	<u>Comparison</u>
3-112	(See LC 9)	<p><u>Rule-making Record:</u> Model Act sets out what is to be contained in the rulemaking record for each adopted rule. All written comments regarding the rule are required to be included in the record as well as transcripts of official oral proceedings. The record is reviewable by judicial review, but need not constitute the exclusive basis for agency action on the rule. LC 9 requires that necessity for a rule be demonstrated in an agency's notice of proposed rulemaking and in the written and oral data, views, comments, and testimony considered by the agency.</p>
3-113	2-4-305(7), MCA	<p><u>Invalidity of Rules Not Adopted According to Chapter:</u> Model Act places a 2-year time limitation on legal challenges to a rule for noncompliance with provisions of the Act. No such limitation appears in MAPA.</p>
3-114	2-4-306(1), MCA	<p><u>Filing of Rules:</u> Model Act is substantially similar to MAPA.</p>
3-115	2-4-306(4), 2-4-303, MCA	<p><u>Effective Date of Rules:</u> Model Act is similar to MAPA regarding effective date of rules being 30 days after filing and publication unless otherwise provided. Subsection (2) of the Model Act is an emergency adoption provision similar to 2-4-303, MCA, but adds rules required by law or court order, rules conferring a benefit or removing a restriction, or rules delaying the effective date of another rule. Under MAPA emergency rules are effective for only 120 days.</p>



<u>Model Act Section</u>	<u>Similar MAPA Section</u>	<u>Comparison</u>
3-116	2-4-102(10(a) through (f), 2-4-201, MCA	<u>Special Provisions for Certain Classes of Rules:</u> Model Act exempts rules governing internal management of agencies from requirements of Act, as does MAPA, and adds subsections (3) through (7) because it was considered unduly burdensome on agencies to go through normal procedures for these types of rules.
3-117	2-4-315, MCA	<u>Petition for Adoption of Rules:</u> Model Act allows any person to petition an agency requesting adoption of a rule. MAPA allows interested persons or legislators to petition agencies for the adoption, amendment, or repeal of rules.
CHAPTER II		
3-201	2-4-314, MCA	<u>Agency Review of Rules:</u> Model Act requires agencies to review their rules annually and prepare an analysis of each rule at least once every 7 years. MAPA requires biennial review of rules.
3-202	(See I.C. 22)	<u>Gubernatorial Review of Rules;</u> <u>Administrative Rules Counsel:</u> Model Act gives the governor veto authority over rules. Governor is to appoint an administrative rules counsel to advise the governor concerning this article.
3-203	2-4-401, T. 5, Ch. 14, MCA	<u>Administrative Rules Review Committee:</u> Model Act creates a committee substantially similar to the Administrative Code Committee.

<u>Model Act Section</u>	<u>Similar MAPA Section</u>	<u>Comparison</u>
3-204	2-4-402, 2-4-506(3), MCA	<p>Administrative Rules Review Committee Review of Rules: Model Act provides that the committee selectively review possible, proposed and adopted rules, and may hold public proceedings on the rules. The committee may recommend statutes affecting or superseding rules. If the committee objects to a rule it files its objection with the Secretary of State, who transmits it to the agency, the administrative rules editor, and the administrative rules counsel. The objection is published in the next issue of the register, and with the published rule. Within 14 days after an objection is filed the agency must respond in writing to the committee. The committee may then withdraw or modify its objection. If judicial review of a rule objected to by the committee results, the burden is on the agency to establish that the rule is within the agency's procedural or substantive authority. The comment regarding subsection (d)(5) suggests considering awarding a party prevailing against an agency in this situation court costs and attorney fees.</p>

PREFATORY NOTE

The Commissioners on Uniform State Laws first adopted a Model State Administrative Procedure Act in 1946. A revised version of that Model Act was adopted in 1961. Today, more than half of the states have an administrative procedure act based, at least in part, on either the original Model Act or its 1961 revision.<sup>1</sup>

The case for a complete revision of the Commissioners' 1961 Model Act is very strong. State administrative law has grown enormously in size and complexity since 1961. In the last twenty years, there has also been a great deal of experience with the provisions of the Model Act as enacted in the several states, and also a great deal of state legislative experimentation with additional or different administrative procedure requirements. Scholars in the field have also been especially active during the last twenty years, proposing new solutions to old problems as well as new evaluations of old solutions.

There is certainly ample indication that state legislatures will be very receptive to new ideas on administrative procedure legislation. The volume of such legislation considered by state legislatures annually has dramatically increased in recent years, as has the amount of legislative time spent considering state administrative procedure reform generally. It is also significant that the movement for administrative procedure reform is, at this time, well underway at the federal level. Several bills that would modify substantially the Federal Administrative Procedure Act are currently receiving serious consideration in Congress.<sup>2</sup> And the American Bar Association recently completed a major study of the process of federal administrative regulation.<sup>3</sup> Against this background, and the substantial learning derived from the experience of the last twenty years, a complete reexamination of the 1961 Model State Administrative Procedure Act seems essential.

The history of administrative procedure legislation of the type proposed in this Model Act is relatively short. The initial impetus for such legislation was, not surprisingly, the New Deal of the 1930s.<sup>4</sup> As the federal bureaucracy multiplied in an effort to deal with the many serious problems of the Depression, the public and the organized bar became alarmed at what they perceived to be, in many cases, an unfettered, hence dangerous, exercise of authority by administrative agencies. The American Bar Association issued a series of reports between 1934 and 1938 decrying excesses of the federal administrative process as it was then being operated. In 1937, the President's Committee on Administrative Management suggested a very substantial reordering of the federal agencies to cure alleged excesses.



This was followed in 1939 by the appointment of the Attorney General's Committee on Administrative Procedure, which was charged to ascertain the need for reform in the procedures utilized in the federal administrative process. Before the work of that Committee was completed, Congress passed the Walter-Logan Bill, which was chiefly a product of the initiative of the American Bar Association. Some people believed that the Walter-Logan Bill would make the federal administrative process weak, inefficient, and ineffective. Because he shared that view, President Roosevelt vetoed this 1940 effort. At the time of his veto, the President stated that he wanted to await the outcome of the work of the Attorney General's Committee before he approved any legislation in this complex field. The Final Report of the Attorney General's Committee on Administrative Procedure was filed in 1941. By that time, the Second World War preoccupied the country. In 1946, with war distractions out of the way, both houses of Congress unanimously approved the Federal Administrative Procedure Act.<sup>5</sup>

The Federal Act was a fair compromise between extremes. It neither shackled the administrative process in a way that rendered it unduly cumbersome, inefficient, or ineffective, nor retained totally unfettered agency discretion in the procedures by which agencies implemented their legislative mandates. The Federal Act established uniform fair procedures for federal agency decision making, whether that decision making assumed the form of rule making or adjudication. It also attempted to ensure greater openness for agency action of all kinds by assuring the public increased access to information in the hands of government that affected their rights. An additional check on the administrative process was sought to be provided through a broadly applicable judicial review provision. "The major effects of the Act were to satisfy the political will for reform [and] to improve and strengthen the administrative process ...."<sup>6</sup>

During the late 1930s and early 1940s, a parallel development was occurring with respect to state administrative procedure legislation.<sup>7</sup> In 1938, the American Bar Association Committee on Administrative Agencies and Tribunals issued a report dealing with judicial review of state administrative action in state courts. The following year, the same Committee produced a proposed act dealing with some of the major phases of state administrative procedure. It intended this draft to be a model for future state legislation on the subject. In 1939, this proposed statute was submitted to the National Conference of Commissioners on Uniform State Laws, which undertook to study the matter. In the following three years, the Commissioners produced several drafts of a state administrative procedure act. From 1942-46, the draft state administrative procedure act of the Commissioners on Uniform State Laws was held in abeyance while Congress and the President agreed on a federal statute. When the federal law was finally enacted in 1946, the National Conference of Commissioners on Uniform State Laws approved its Model State Administrative Procedure Act.

Even before the Commissioners on Uniform State Laws approved its 1946 Model Act, state administrative procedure acts began to appear. North Dakota was the first in the field. That state enacted a law in 1941 based on an incomplete and early tentative draft of the 1946 Model Act.<sup>8</sup> It set out basic procedures for state agency rule making and adjudication. Wisconsin followed in 1943 by adopting a statute modeled more closely on a complete version of a tentative draft of the original Model Act.<sup>9</sup> Other states quickly followed, enacting administrative procedure acts based in whole or in part on the 1946 Model Act.<sup>10</sup>

In 1958, the Commissioners undertook a revision of its Model State Administrative Procedure Act. This revision was completed and approved in 1961. After that revision, more states adopted administrative procedure acts, many of them based at least in part on the 1961 Revised Model Act.<sup>11</sup> Today, more than half of the states have general and comprehensive administrative procedure acts that are based in whole or in part on the 1946 Model Act or the 1961 Revised Model Act.<sup>12</sup> These state laws are "general" in the sense that they apply to all state administrative agencies save those specifically excepted therefrom, and "comprehensive" in the sense that they cover all of the main subjects dealt with by the 1946 and 1961 versions of the Model Act -- public information, rule making, adjudication, and judicial review. Many other states have adopted general administrative procedure acts dealing with only some of these subjects.

Of course, each of these states has used the Model Act only as a starting point. While some states have adopted the Model Act with only few changes, most of them have altered it in various ways, and some of them to a very substantial extent. These changes, engrafted onto the Model Act when it was enacted by the several states, have provided a major new source for proposed improvements to its text.

As noted earlier, however, a new Model State Administrative Procedure Act must also adequately reflect the tremendous recent growth in state government in general and of state administrative agencies in particular. In the last twenty years, vast social changes in the United States have, for good or for ill, altered the function of state government. For example, in 1961 issues such as environmental preservation, energy conservation, and safety in the workplace were rarely even considered by the legislatures of the states. Yet today, these issues are so important that most states have separate agencies to deal with them. The number and extent of public welfare programs have also grown since 1961. States now usually have several large agencies administering such benefactory programs, which raise some new and difficult procedural questions. This growth in state government, and change in the nature of its responsibilities must, therefore, be reflected in the provisions of any new Model Act.

A new Model Act must also reflect certain judicial developments of the last twenty years. In many state courts there has been a distinct shift away from an insistence on clear standards in legislative delegations to uphold their constitutionality. Rather, state courts are al-



lowing legislative delegations with only very general standards if they are surrounded by adequate procedural safeguards, such as those found in a well-drafted and comprehensive administrative procedure act.<sup>13</sup> This, too, has heightened the significance of state administrative procedure acts and the adequacy of their provisions. Any new Model Act will have to deal with this enlarged importance of the contents of such state acts. It will also have to reflect the drastically changing nature of due process requirements announced during the last twenty years in the decisions of the United States Supreme Court.

The following Model State Administrative Procedure Act is entirely new; but it uses the general structure of the 1961 Revised Model Act as its starting point. Like that earlier effort, this Act has four main subjects: freedom of information, rule making, adjudication, and judicial review. But the drafters of this proposed Model Act did not feel bound to follow the provisions of the 1961 Act when they were inadequate in light of more recent experience, scholarship, or changes that have occurred in government or society. In addition, the drafters of this effort have produced an act that is more detailed than the earlier Model Act. There are several reasons for this. First, virtually all state administrative procedure acts are much more detailed than the 1961 Revised Model Act. Second, the states badly need and want guidance on this subject in more detail than the earlier act provided. Third, substantial experience under the acts of the several states suggests that much more detail than is provided in the earlier Model Act is in fact necessary and workable in light of current conditions of state government and society. Since this is a Model Act and not a Uniform Act, greater detail in this act should also be more acceptable because each state is only encouraged to adopt as much of the act as is helpful in its particular circumstances.

Of course, this proposed act does not deal with minor details. Like the earlier Model Act, it too "deals primarily with [the] major principles [of administrative procedure], not with matters of minor detail," on the assumption that in the state administrative process "there are certain basic principles of common sense, justice, and fairness that can and should prevail universally."<sup>14</sup> The point is, however, that more "elaboration of detail to support the essential major features"<sup>15</sup> of such a scheme is justifiable today than in 1961, in light of changed circumstances and experiences since then. Yet, that somewhat greater detail in this proposed act is drafted so as to assure a fair balance between the urgent need for efficient, economical, and effective government on the one hand, and a responsible administrative process in which persons may adequately protect their interests against improper or unwise government action on the other.

This Model Act, like the 1961 Revised Model Act, creates only procedural rights and imposes only procedural duties. It seeks to simplify government by assuring a uniform minimum procedure to which all agencies will be held in the conduct of their functions. Further, this act seeks to increase public access to all of the sources of law used by agencies, and to facilitate and encourage the issuance of reliable advice by agencies as to the applicability to particular circumstances of law within their primary jurisdiction. In addition, it attempts to facilitate



public participation in the formulation of the law adopted by agencies, ensure accountability of agencies to the public, and enhance legislative and gubernatorial oversight of agencies. An effort is also made in this Model Act to simplify the process of judicial review and civil enforcement of agency action, and to increase its availability. The rights created and duties imposed by the provisions of this new Model Act would be in addition to those created or imposed by other statutes. And, except to the extent another statute expressly provides that it shall take precedence over this Act, the new Model Act would take precedence over all other statutes, including those subsequently enacted, that appear to diminish a right created or a duty imposed by the Model Act. Lastly, as noted earlier, this Model Act seeks to strike a reasonable balance between the need for efficient, economical, and effective government administration, and the need to provide persons adequate procedural protection when agencies take action affecting them.

#### Footnotes

1. See 14 Uniform Laws Annotated at 357 (1980 Master Edition) listing twenty-nine such states: Arkansas, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. 1 K. Davis, Administrative Law Treatise Section 1:10 at 36-37 (2d ed. 1978), also lists Arizona, Florida, Indiana, Massachusetts, New Mexico, and Oregon as such states and notes that "[o]ther states . . . have comprehensive legislation not based on the Model Act."
2. See for example S. 2147, 96 Cong. Rec. S19039 (daily ed. Dec. 18, 1979) (Sen. Culver); S. 755, 96 Cong. Rec. S3338 (daily ed. Mar. 26, 1979) (Sen. Ribicoff); S. 1291, 96 Cong. Rec. S7126 (daily ed. Jun. 6, 1979) (Sen. Kennedy).
3. A.B.A. Commission on Law and the Economy, Federal Regulation: Roads to Reform (Final Report 1979).
4. The following discussion of the history of the federal legislation is based primarily on 1 K. Davis, Administrative Law Treatise, Sections 1:7 (2d ed. 1978) and Vanderbilt, "Legislative Background of the Federal Administrative Procedure Act," in The Federal Administrative Procedure Act and the Administrative Agencies 1 (G. Warren ed. 1947).
5. 1 K. Davis, Administrative Law Treatise, Section 1:7, at 24 (2d ed. 1978); 5 U.S.C. Sections 551-59, 701-06, 1305, 3105, 3344, 5362, 7521 (1976) (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237).
6. 1 K. Davis, Administrative Law Treatise, Section 1:7, at 24 (2d ed. 1978).

7. This discussion of the Model Act and state developments relies primarily on Stason, "The Model State Administrative Procedure Act," 33 Iowa L. Rev. 196 (1948); 1961 Revised Model State Administrative Procedure Act, "Prefatory Note;" K. Davis, Administrative Law Treatise, Sections 1:10-1:11 (2d ed. 1978); 1 F. Cooper, State Administrative Law, 7-13 (1965).
8. N.D. Cent. Code Ann., ch. 28-32 (1974) (originally enacted as Act of March 17, 1941, ch. 240, [1941] N.D. Laws 393). See Hoyt, "North Dakota Leads in Administrative Law Field," 25 J. Am. Jud. Soc'y 114 (1941).
9. Wisc. Stat. Ann. ch. 227 (West 1957) (originally enacted as Act of June 28, 1943, ch. 375, [1943] Wisc. Laws 670). See Hoyt, "The Wisconsin Administrative Procedure Act," 1944 Wisc. L. Rev. 214.
10. See 1 K. Davis, Administrative Law Treatise, Section 1:04-5 at 14 (1970 Supp.). Professor Davis reported that twelve states -- California, Illinois, Indiana, Massachusetts, Michigan, Missouri, North Carolina, North Dakota, Ohio, Pennsylvania, Virginia, and Wisconsin -- adopted legislation based in whole or in part on the 1946 version of the Model Act.
11. See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rule-making Process," 60 Iowa L. Rev. 731, 746-747 (1975), listing at least ten states as of that date that had adopted legislation based on the 1961 version of the Model Act.
12. See note 1.
13. See 1 K. Davis, Administrative Law Treatise, Section 3:15, at 209-214 (2d ed. 1978).
14. 1961 Revised Model State Administrative Procedure Act, "Prefatory Note," at 8.
15. 1961 Revised Model State Administrative Procedure Act, "Prefatory Note," at 8.

## ARTICLE I

## GENERAL PROVISIONS

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Be it enacted.....

1. SECTION 1-101. [Short Title.]
2. This Act may be cited as the [state] Administrative Procedure Act.
1. SECTION 1-102. [Definitions.]
2. As used in this Act:
3. (1) "Agency" means each board, commission, department, officer,
4. or other administrative unit of this state, including the agency head,
5. and one or more members of the agency head or agency employees or other
6. persons directly or indirectly purporting to act on behalf or under the
7. authority of the agency head. The term does not mean the legislature or
8. the courts [, or the governor] [, or the governor in the exercise of
9. powers derived directly and exclusively from the constitution of this



10. state]. While the term does not mean a political subdivision of the  
11. state or any of the administrative units of a political subdivision,  
12. "agency" does mean each board, commission, department, officer or other  
13. administrative unit created or appointed by joint or concerted action of  
14. an agency and one or more political subdivisions of the state or any of  
15. their units. To the extent it purports to exercise authority subject to  
16. any provision of this Act, an administrative unit otherwise qualifying  
17. as an "agency" shall be treated as a separate agency even if the unit is  
18. located within or subordinate to another agency.

19. (2) "Agency action" means:

20. (i) the whole or a part of a rule or an order;

21. (ii) the failure to issue a rule or an order; or

22. (iii) an agency's performance of, or failure to perform, any other  
23. duty or function, discretionary or otherwise.

24. (3) "Agency head" means the individual or body of individuals in whom  
25. the ultimate legal authority of the agency is vested by constitution or statute,

26. (4) "License" means a franchise, permit, certification, approval,  
27. registration, charter, or similar form of authorization required by law.

28. (5) "Order" means an agency action of particular applicability that  
29. determines the legal rights, duties, privileges, immunities, or other legal  
30. interests of a specific person or persons. [The term does not mean an  
31. "executive order" issued by the governor in the exercise of authority conferred  
32. by Section 1-104 or 3-202.]

33. (6) "Party to agency proceedings," or "party" in context so  
34. indicating, means:

35. (i) a person to whom the agency action is specifically directed; or

36. (ii) a person named as a party to the agency proceeding, or allowed  
37. to intervene or participate as a party in the agency proceeding.

38. (7) "Party to judicial review or civil enforcement proceedings," or  
39. "party" in context so indicating, means:

40. (i) a person who files a petition for a judicial review or civil  
41. enforcement proceeding; or

42. (ii) a person named as a party in the judicial review or civil enforce-  
43. ment proceeding, or allowed to participate as a party in the judicial review or  
44. civil enforcement proceeding.

45. (8) "Person" means any individual, partnership, corporation, association,  
46. governmental subdivision or unit thereof, or public or private organization of  
47. any character, and includes another agency.

48. (9) "Provision of law" means any provision of the federal or state  
49. constitution, statutes, rules of court, executive orders, or rules of adminis-  
50. trative agencies.

51. (10) "Rule" means the whole or a part of an agency statement of general  
52. applicability that implements, interprets, or prescribes law or policy, or the  
53. organization, procedure, or practice requirements of an agency. The term  
54. includes the amendment, repeal, or suspension of an existing rule.

55. (11) "Rule making" means the process for formulation and adoption  
56. of a rule.

## COMMENTS

The definition of "agency" in paragraph (1) is a substantial revision of 1961 Revised Model Act, Section 1(1). See generally Bonfield, "The Iowa Administrative Procedure Act: Background; Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L. Rev. 731 at 759-771 (1975), hereinafter cited as Bonfield, IAPA. It omits the requirement that the agency be "authorized by law to make rules or to determine contested cases" in the interest of subjecting as many state governmental units as possible to the provisions of the administrative procedure act. The definition explicitly includes the agency head and those others who act for an agency, and joint state and local bodies, so as to effect the broadest coverage possible. See generally Bonfield, IAPA at 768-770.

Express exclusions listed in the definition of "agency" are the legislature, the courts, and political subdivisions of the state and their offices and units. The 1961 Revised Model Act only impliedly excluded political subdivisions. While a model act to govern the administrative procedure of such subdivisions and their agencies is desirable, a separate statute is necessary for that purpose because of the very different circumstances of local government units when compared to state agencies. The 1961 Revised Model Act also excluded, as does this definition, the legislature and the courts. Note that it is only "the legislature" and "the courts" that are excluded, and not "the legislative branch" and "the judicial branch," and that exemptions from the Act are to be construed narrowly. See generally Bonfield, IAPA at 763-766.

Although the 1961 Revised Model Act did not exclude "the governor" from the definition of "agency," the bracketed language included in paragraph (1) would also exclude "the governor" either entirely, or in the alternative only in the exercise of powers derived directly and exclusively from the state constitution. Some states may think such an exemption desirable because of the direct and clear political accountability of the governor and because the need for such procedures as found in this Act to bind him personally may be less than the need for them to bind other administrative units of state government. In addition, there may be doubts as to the state constitutionality of a statute seeking to impose procedural requirements on the governor with respect to the exercise of powers "derived directly and exclusively from the [state] constitution." In any case note that in the bracketed language only "the governor" is excluded, and not the "office of the governor," and that exemptions from the Act are to be construed narrowly. See generally, Bonfield, IAPA at 764-766.

The last sentence of paragraph (1) is in part derived from Federal Act, Section 551(1), treating as an "agency" "each authority of the Government of the United States, whether or not it is within or subject to review by another agency...." A similar provision is desirable here to avoid difficulties in ascertaining which is "the agency" in any situation where an administrative unit is within or subject to the jurisdiction of another such body. See Bonfield, IAPA at 768-769.



The term "agency action" defined in paragraph (2) expressly includes a "rule" and an "order" defined in paragraphs (10) and (5) and an agency's failure to issue a "rule" or an "order." It goes much further, however. Subparagraph (jii) makes clear that "agency action" includes everything and anything else that an agency does or does not do, whether its action or inaction is discretionary or otherwise. There are no exclusions from that all encompassing definition. As a consequence, there is a category of "agency action" that is neither an "order" nor a "rule" because it neither establishes the legal rights of any particular person nor establishes law or policy of general applicability. The principal effect of the very broad definition of "agency action" is that everything an agency does or does not do is subject to judicial review. See Section 5-101. Success on the merits in such cases, however, is another thing. In this statute, the limited scope of review utilized by the courts in judicial review proceedings, see Section 5-116, is relied on to discourage frivolous litigation, rather than the preclusion of judicial review entirely in whole classes of potential cases. Iowa Act, Section 17A.2(10) contains a definition of "agency action" that is similar in scope to paragraph (2).

The definition of "agency head" is included in paragraph (3) to differentiate for some purposes between the agency as an organic entity that includes all of its employees, and those particular individuals in whom the final legal authority over its operations is vested. See generally, Bonfield, IAPA at 770.

The paragraph (4) definition of "license" is a revised form of 1961 Revised Model Act, Section 1(3).

The definition of "order" in paragraph (5) makes clear that it includes only legal determinations made by an agency that are of particular applicability because they are addressed to named or specified persons. In other words, an "order" includes every "agency action" that determines any of the legal rights, duties, privileges, or immunities of a particular identified individual or individuals. This is to be compared to the paragraph (10) definition stating that a "rule" is an agency statement establishing law or policy of general applicability, that is, applicable to all members of a described class. The primary operative effect of the definition of "order" is in Article IV, governing adjudicative proceedings.

Consistent with the paragraph (5) definition, rate making and licensing determinations of particular applicability, addressed to named or specified parties such as a certain utility company or a certain licensee, are "orders" subject to the adjudication provisions of this statute. In that respect, this Act follows 1961 Revised Model Act, Section 1(2), which treated "ratemaking, [price fixing], and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing" as "contested cases," that is, as adjudications. See also People ex rel. Central Park, N. and E. R. R. Co. v. Willcox, 87 N.E. 517 (N.Y. 1909). Cf. Federal Act, Section 551(4), defining all rate making as rule making. On the other hand, rate making and licensing actions of general applicability, addressed to all members of a described class of providers or licensees, are "rules" under this statute, subject to its rule-making provisions. See the Comments on paragraph (10) of this section.

The bracketed language in paragraph (5), expressly excluding from the definition of "order" an "executive order" issued by the governor under the provisions of this Act, is included to avoid confusion. Although such an "executive order" is in the nature of a "rule" rather than an "order," the term contains the word "order." This could be misleading unless an "executive order" issued under this Act is expressly excluded from the definition of "order."

The definition of "party to agency proceedings" in paragraph (6) differs from the 1961 Revised Model Act, which defines "party" in its Section 1(5) to include "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." The last clause, "properly seeking and entitled ...," was intended to confer upon would-be intervenors the right to seek judicial review if their petitions for intervention were denied. This act omits the clause, "properly seeking and entitled," for a number of reasons. First, the present draft contains one definition of "party" in connection with agency proceedings, in paragraph (6), and another definition of "party" in connection with judicial review or civil enforcement proceedings, in paragraph (7). Accordingly, the definition of "party to agency proceedings" in paragraph (6) is not intended to address the question whether a person is entitled to judicial review. Second, as a related matter, this Act deals with standing to seek judicial review, in Section 5-106, more thoroughly than does the 1961 Revised Model Act. Third, in Section 4-209, this Act deals with intervention in agency proceedings, a topic not addressed at all in the 1961 Revised Model Act except by means of the implication in its 1961 definition of "party." Finally, the 1961 Revised Model Act's concept of persons "properly seeking and entitled ..." could lead to awkward consequences, if included in the definition of "party." For example, it could compel a person serving copies of pleadings to ascertain whether each potential recipient of service, known or unknown, is "properly seeking and entitled...."

The definition of "person" in paragraph (8) is a modified form of Tennessee Act, Section 4-5-102(6). This definition is broader than the 1961 Revised Model Act definition in Section 1(6) because it includes an "agency" other than the agency against whom rights under this Act are asserted by the "person." Inclusion of such agencies and units of government insures, therefore, that other agencies or other governmental bodies can petition an agency for the adoption or repeal of a rule, and will be accorded all the other rights that a "person" will have under the Act. A number of states include other agencies in the definition of "person." See, for example, New York Act, Section 102(6) and Wisconsin Act, Section 227.01(8).

References are made, in numerous parts of this Act, to external sources of authority. In order to express differing meanings to reflect the drafters' intent, various terms are used to denote the external sources of authority intended -- some references are to "statute," others are to "statute or rule," and still others are to "provision of law." As indicated by the definition in paragraph (9), the term "provision of law" is intended to have a uniform meaning whenever used in the Act. Its meaning is not intended to include either the common law decisions of courts in non-statutory settings, or the adjudicative decisional precedents of administrative agencies. It does, however, include controlling case law constructions of the expressly enumerated species of law.



The definition of "rule" in paragraph (10) is a modified form of 1961 Revised Model Act, Section 1(7). For a discussion of this definition which includes all agency statements of general applicability that implement, interpret, or prescribe law or policy, without regard to the terminology used by the issuing agency to describe them, see Bonfield, IAPA at 826-832. The 1961 Revised Model Act and other state statutes exclude specified statements from the definition of "rule" as a drafting technique with which to exempt those statements from the procedural and publication requirements applicable to rules. In Section 3-117 this Act instead expressly exempts specified statements from those requirements. The contents of a rule when initially adopted are specified in Section 3-111(a).

Consistent with the definition in paragraph (10), rate making and licensing determinations of general applicability, that is, addressed to all members of a class by description, are "rules" subject to the rule-making provisions of this statute. Note also that the statement in the Comment to 1961 Revised Model Act, Section 1(7), with respect to the definition of "rule," is also normally applicable here: "Attention should be called to the fact that rules, like statutory provisions, may be of general applicability even though they may be of immediate concern to only a single person or corporation, provided the form is general and others who may qualify in the future will fall within its provisions."

The definition of "rule making" in paragraph (11) is a modified form of Federal Act, Section 551(5).

1. SECTION 1-103. [Construction.]
2. This Act creates only procedural rights and imposes only procedural
3. duties. They are in addition to those created and imposed by every other
4. statute. This Act takes precedence over every other statute now in exis-
5. tence or subsequently enacted that appears to diminish a right created or
6. duty imposed by this Act, unless the other statute expressly provides that
7. the other statute takes precedence over this Act. Nothing in this Act precludes
8. an agency from conferring upon persons procedural rights in addition to those
9. conferred by this Act, so long as rights conferred upon other persons by any
10. provision of law are not substantially prejudiced thereby.



## COMMENTS

This section is a substantial revision of Iowa Act, Sections 17A.1 and 17A.23. The 1961 Revised Model Act does not contain analogous provisions. However, the explicit enumeration of these rules for construction of the Act will help assure that the Act is interpreted to accomplish its objectives. See Bonfield, IAPA at 755-759, for a full discussion of the much more extended Iowa Act provisions.

This section explicitly assures that where there is a direct conflict between the requirements of another statute and this Act, this Act will prevail unless there is a wholly unambiguous contrary legislative decision. This is consistent with the philosophy that the burden should be on those seeking any exemption from the Act to demonstrate their entitlement thereto in unmistakable statutory language indicating that the legislature has actually considered the question of an exemption and determined that it is warranted. See Bonfield, IAPA at 756. Some other statutes explicitly adopting this notion are Federal Act, Section 559 and Minnesota Act, Section 15.14. Adopting states should examine all of their existing statutory provisions governing the procedures to be followed by particular agencies to determine if any of those provisions should be excepted from the operation of this section.

1. [SECTION 1-104. [Suspension of Act's Provisions When Necessary  
2. to Avoid Loss of Federal Funds or Services.]
3. (a) To the extent necessary to avoid a denial of funds or services
4. from the United States which would otherwise be available to the state,
5. the [governor by executive order] [attorney general by rule] [may] [shall]
6. suspend, in whole or in part, one or more provisions of this Act. The [governor
7. by executive order] [attorney general by rule] shall declare the termination of
8. a suspension as soon as it is no longer necessary to prevent the loss of
9. funds or services from the United States.
10. [(b) An executive order issued under subsection (a) is subject to the
11. requirements applicable to the adoption and effectiveness of a rule.]
12. (c) If any provision of this Act is suspended pursuant to this section,
13. the [governor] [attorney general] shall promptly report the suspension to
14. the legislature. The report must include recommendations with respect
15. to any desirable legislation that may be necessary to conform this Act
- with federal law.]

## COMMENTS

This section is a modified version of Iowa Act, Section 17A.21. The 1961 Revised Model Act does not contain a similar provision. The provisions of this section permit specific functions of agencies to be exempted from applicable provisions of the Act only to the extent that is necessary to prevent the denial of federal funds or a loss of federal services. The test to be met is simply whether, as a matter of fact, there will actually be a loss of federal funds or a loss of federal services if there is no suspension. And the suspension is effective only so long as, and to the extent necessary to, avoid the contemplated loss. See generally Bonfield, IAPA at 771-776. Section 1-104 is in brackets because some state legislatures may not want to delegate this suspensive authority to any executive official, reserving it instead for ad hoc decision by the entire legislative process.

If this provision is enacted, the enacting state must decide whether the governor or the attorney general should make the suspension determination. The issuance of such a suspension order is a rule so all usual rule-making requirements will be applicable thereto when that order is issued by the attorney general. If the governor is chosen to issue the suspension order, bracketed subsection (b) should be included to make clear that such an executive order is subject to rule-making requirements whether or not the governor is partly or entirely excluded from the definition of "agency."

The governor or attorney general is not required to issue a suspension order merely upon the receipt of a federal agency certification that a suspension is necessary. The suspension must be actually necessary. That is, the governor or attorney general must determine that the federal agency is correct in its assertion that federal funds may lawfully be withheld from the state agency if that agency complies with certain provisions of this Act, and that the federal agency intends to exercise its authority to withhold those funds if certain provisions of this Act are followed. However, if these two requirements are met, the governor or attorney general "shall" suspend the provision if that bracketed alternative is chosen. A permissive "may" is also included in brackets for those states desiring to give them discretion on this matter. See Bonfield, IAPA at 772-773.

1. SECTION 1-105. [Waiver.]
2. Except to the extent precluded by another provision of law, a
3. person may waive any right conferred upon that person by this Act.

## COMMENTS

This section embodies the standard notion of waiver. Rights under this statute should be subject to waiver in the same way that rights under any other civil statute are normally subject to waiver.



1. SECTION 1-106. [Informal Settlements.]

2. Except to the extent precluded by another provision of law, informal  
3. settlement of matters that may make unnecessary more elaborate proceedings  
4. under this Act is encouraged. Agencies shall establish specific procedures  
5. for attempting and executing informal settlement of matters. This section does  
6. not require any party or other person to settle a matter pursuant to informal  
7. procedures.

## COMMENTS

This section expressly encourages informal settlements of controversies that would otherwise end in more formal proceedings. Obviously, economy and efficiency in government commends such a policy except as it is otherwise precluded by law. A requirement that each agency issue rules providing for informal settlement procedures assures that everyone is on notice as to the availability and utility of such procedures.

1. SECTION 1-107. [Conversion of Proceedings.]

2. (a) The presiding officer or other agency official responsible for  
3. a proceeding may, at any point in the proceeding where such action is  
4. appropriate and in the public interest, and shall, if required by any  
5. provision of law, convert that proceeding to another type of proceeding  
6. provided for by this Act. A conversion of a proceeding of one type to a  
7. proceeding of another type may be effected only upon notice to all  
8. parties to the original proceeding, and provided it does not substantially  
9. prejudice the rights of any party.

10. (b) If the presiding officer or other agency official responsible  
11. for the original proceeding would not have authority over the new proceed-  
12. ing to which it is to be converted, that officer or official, in accordance  
13. with agency rules, shall secure the appointment of a successor to preside  
14. over or be responsible for that new proceeding.



15. (c) To the extent feasible and consistent with the rights of parties  
16. and the requirements of this Act pertaining to the new proceeding, the  
17. record of the original agency proceeding shall be used in the new agency proceeding

18. (d) After a proceeding is converted from one type to another, the  
19. presiding officer or other agency official responsible for the new proceeding  
20. shall:

21. (1) give such additional notice to parties or other persons as  
22. is necessary to satisfy the requirements of this Act pertaining to such  
23. proceedings;

24. (2) dispose of the matters involved without further procedure  
25. if sufficient proceedings have already been held to satisfy the requirements  
26. of this Act pertaining to those proceedings; and

27. (3) conduct or cause to be conducted any additional proceedings  
28. necessary to satisfy the requirements of this Act pertaining to such  
29. proceedings.

30. (e) Each agency shall adopt rules to govern the conversion of  
31. one type of proceeding to another. Those rules must include an enumeration  
32. of the factors to be considered in determining whether and under what  
33. circumstances one type of proceeding will be converted to another.

#### COMMENTS

Subsection (a) authorizes agencies to convert one type of agency proceeding to another type of agency proceeding, so long as no party is substantially prejudiced thereby. The courts will have to decide on a case-by-case basis what constitutes substantial prejudice in this context. And, of course, even if the rights of a particular party are substantially prejudiced by such a conversion, the party may voluntarily waive them. In addition, it should be noted that the "substantially prejudice the rights of any party" limitation on conversion of agency proceedings from one type to another is not intended to disturb an existing body of law. In certain situations agencies may lawfully deny particular individuals adjudicatory hearings to which they otherwise would be entitled by conducting a rule-making proceeding that determines for an entire class issues that otherwise would be the subject of necessary adjudicatory hearings. See Note, "The Use of Agency Rulemaking to Deny Adjudications Apparently Required by Statute," 54 Iowa L. Rev. 1086 (1969). Similarly, the

substantial prejudice limitation is not intended to disturb the existing body of law allowing agencies, in certain situations, to make determinations through adjudicatory procedures that have the effect of denying persons opportunities they might otherwise be afforded if rule-making procedures were used instead. See e.g. Young Plumbing and Heating Co. v. Iowa N.R.C., 276 N.W.2d 377 (Iowa 1979). Subsection (a) also contains several limiting standards in addition to the protection of nonconsenting parties against substantial prejudice. Conversions of agency proceedings from one type to another are authorized only when "appropriate and in the public interest" or when "required by any provision of law," and only after notice to all parties and other affected persons.

Within the limits just noted, agencies should be authorized to use those procedures in a proceeding that are most likely to be effective and efficient under the particular circumstances. Subsection (a) provides that desirable flexibility for agencies. For example, an agency that wants to convert a formal adjudicatory hearing into a conference hearing or summary proceeding, or a conference hearing or summary proceeding into a formal adjudicatory hearing, may do so under this provision if such a conversion is "appropriate and in the public interest," adequate notice is given, and the rights of no party are substantially prejudiced. Similarly, an agency called upon to explore a new area of law in a declaratory order proceeding may prefer to do so by rule making. That is, the agency may decide to have full public participation in developing its policy in the area and to declare law of general applicability instead of issuing a determination of only particular applicability at the behest of a specific party in a more limited proceeding. So long as all of the standards set forth in subsection (a) are met, this provision would authorize such a conversion from one type of agency proceeding to another. While it is unlikely that a conversion consistent with all of these statutory standards could occur more than once in the course of a proceeding, the possibility of multiple conversions in the course of a particular proceeding is left open by the statutory language. In adjudications, the prehearing conference could be used to choose the most appropriate form of proceeding at the outset, thereby diminishing the likelihood of any later conversion or conversions.

Subsection (b) deals with the mechanics of transition from one type of proceeding to another. The individual in charge of the original proceeding must, according to this provision, secure the appointment of a successor if that first official is disqualified to preside over the new proceeding.

Subsection (c) seeks to avoid unnecessary duplication of proceedings by requiring the use of as much of the record in the first proceeding as is possible in the second proceeding, consistent with the rights of the parties and the requirements of this Act.

Subsection (d) prescribes the duties of the official in charge of the new proceeding after a conversion is effected.

Subsection (e) requires agencies to adopt rules to effect such conversions of one type of proceeding to another, provide for the transition from one type to another, and specify the conditions under which such conversions will be effected.

1. SECTION 1-108. [Applicability and Effective Date.]

2. This Act applies to all agencies and proceedings not expressly  
3. exempted and, except as to proceedings then pending, takes effect on [date].  
4. For the purpose of determining whether a proceeding is pending on the  
5. effective date of this Act, a judicial review or civil enforcement proceeding  
6. is a proceeding separate from any agency proceeding on which it may be based.

COMMENTS

The applicability and effective date provision in subsection (e) comes from 1961 Revised Model Act, Section 19 and Iowa Act Sections 17A.1(2) and 23. See Ponfield, IAPA at 755-759.

1. SECTION 1-109. [Severability.]

2. If any provision of this Act or the application thereof to any person  
3. or circumstance is held invalid, the invalidity does not affect other  
4. provisions or applications of the Act which can be given effect without  
5. the invalid provision or application, and for this purpose the provisions  
6. of this Act are severable.

COMMENTS

The severability provision comes from 1961 Revised Model Act, Section 17.



## ARTICLE 11

## PUBLIC ACCESS TO AGENCY LAW AND POLICY

## COMMENTS

Article 11 does not purport to be a general public records act. The Commissioners have adopted such a statute. See 1980 Uniform State Information Practices Code. Rather, Article 11 is only meant to provide easy access to the law and policy relevant to the rights of persons subject to the administrative process. This Article must, therefore, be viewed as a supplement to a more general public records act and not as a substitute therefor.

SECTION 2-101	<u>[Administrative Rules Editor; Publication, Compilation, Indexing, and Public Inspection of Rules.]</u>	----- 20
SECTION 2-102	<u>[Public Inspection and Indexing of Agency Orders.]</u>	- 24
SECTION 2-103	<u>[Declaratory Orders.]</u>	----- 25
SECTION 2-104	<u>[Required Rule Making.]</u>	----- 28
SECTION 2-105	<u>[Model Rules of Procedure.]</u>	----- 32

1. SECTION 2-101. [Administrative Rules Editor; Publication, Compilation, Indexing, and Public Inspection of Rules.]
2. (a) Within the executive branch there shall be an [administrative rules
3. editor]. The [administrative rules editor] shall be appointed by the [governor]
4. and shall serve at the pleasure of the [governor].
5. (b) Subject to the provisions of this Act, the [administrative rules editor]
6. shall prescribe a numbering system, form, and style for all proposed and adopted
7. rules caused to be published by that office, and shall have the same editing
8. authority with respect to the publication of rules as the [revisor of statutes]
9. has with respect to the publication of statutes.
10. (c) The [administrative rules editor] shall cause the ["administrative
11. bulletin"] to be published in pamphlet form [once each week]. The
12. [administrative bulletin] must contain:

13. (1) notices of proposed rule adoption prepared so that the  
14. text of the proposed rule shows the text of any existing rule proposed  
15. to be changed and the change proposed;

16. (2) newly filed adopted rules prepared so that the text of the  
17. newly filed adopted rule shows the text of any existing rule being changed  
18. and the change being made;

19. (3) any other notices and materials designated by [law] [the  
20. administrative rules editor] for publication therein; and

21. (4) an index to its contents by subject.

22. (d) The [administrative rules editor] shall cause the ["administrative  
23. code"] to be compiled, indexed by subject, and published [in loose-leaf form].  
24. All of the effective rules of each agency must be published and indexed in  
25. that publication. The [administrative rules editor] shall also cause [loose-  
26. leaf] supplements to the [administrative code] to be published at least  
27. every [3 months]. [The loose-leaf supplements must be in a form so that they  
28. may be inserted in the appropriate places in the permanent [administrative  
29. code] compilation.]

30. (e) The [administrative rules editor] may omit from the [administrative  
31. bulletin or code] any proposed or filed adopted rule the publication of which  
32. would be unduly cumbersome, expensive, or otherwise inexpedient, if:

33. (1) knowledge of the rule is likely to be important to only a small  
34. class of persons;

35. (2) the proposed or adopted rule in printed or processed form  
36. is made available on application to the issuing agency at no more than its  
37. cost of reproduction; and

38. (3) the [administrative bulletin or code] contains a notice stating  
39. in detail the specific subject matter of the omitted proposed or adopted rule

40. and how a copy thereof may be obtained.

41. (f) The [administrative bulletin and administrative code] must be  
42. furnished to [designated officials] without charge and to all subscribers at  
43. a cost to be determined by the [administrative rules editor]. Each agency  
44. shall also make available for public inspection and copying those portions of  
45. the [administrative bulletin and administrative code] containing all rules  
46. adopted or used by the agency in the discharge of its functions, and the index  
47. pertaining thereto.

48. (g) Except as otherwise provided by a provision of law, subsections  
49. (c) through (f) do not apply to rules within the scope of Section 3-116,  
50. and the following provisions apply instead.

51. (1) Each agency shall maintain an official, current, and dated  
52. compilation that is indexed by subject, containing all of its rules within the  
53. scope of Section 3-116. Each addition, change, or deletion to the official  
54. compilation must also be dated, indexed, and a record thereof kept. Except  
55. for those portions containing rules within the scope of Section 3-116(2), the  
56. compilation must be made available for public inspection and copying. Certified  
57. copies of the full compilation must also be furnished to the [secretary of  
58. state, the administrative rules counsel, and members of the administrative  
59. rules review committee], and be kept current by the agency at least every [30]  
60. days.

61. (2) A rule subject to the requirements of this subsection may not  
62. be relied on by an agency to the detriment of any person until the requirements  
63. of paragraph (1) are satisfied. This provision is inapplicable to any person  
64. who has actual timely knowledge of the Section 3-116 rule. The burden of  
65. proving that knowledge is on the agency. This provision is also inapplicable  
66. to the extent necessary to avoid imminent peril to the public health, safety,  
67. or welfare.



## COMMENTS

This section is a substantially modified and extended form of 1961 Revised Model Act, Section 5, and Iowa Act, Section 17A.6. See Bonfield, IAPA at 877-883.

The "administrative rules editor" is bracketed throughout the section because the particular official designated to perform the functions assigned to that office by this Act may vary depending upon the needs and traditions of the enacting state. Since the official designated is charged with publishing executive branch law, appointment by and direct responsibility to the governor is desirable although, in some states, appointment by and direct responsibility to the secretary of state might be an appropriate alternative. The editing authority vested in the "administrative rules editor" is similar to that found in a number of states. See e.g. Alaska Statutes, Section 44.62.125(b)(6).

"As a result of a new survey conducted in early 1979, it is possible to report that thirty-eight of the fifty states have now either published [administrative] codes or are preparing to do so." See Tseng and Pedersen, "Commentary: Acquisition of State Administrative Rules and Regulations -- Update 1979," 31 Admin. L. Rev. 405 at 405-406 (1979). Although most states publish their compilations of administrative agency rules in loose-leaf form, the requirement that it be published in that form is bracketed so that each state may consider the precise form of publication in light of its own particular needs and traditions.

In considering the frequency of publication for the administrative bulletin and code supplement, each state should consult the other timing provisions of this Act to ensure that its purposes are not frustrated by too infrequent publication of those periodicals.

The newly filed adopted rule that must be published in the "administrative bulletin" according to Section 2-101(c)(2) includes all of the contents specified in Section 3-111(a). When included in the "administrative code" compilation required by Section 2-101(d), however, only the body of the rule, that is, only its operative portions, will be included, in the same way as a session law of the legislature is transformed when it is later included in the state statutory code compilation.

There is no provision equivalent to paragraph (1) of subsection (g) in the 1961 Revised Model Act. This minimum requirement that agencies maintain a current, indexed compilation of some sort, containing all of its law of general applicability that is exempt from usual rule publication requirements by this subsection as it specifically incorporates Section 3-116, seems entirely reasonable. See Comments to that section for the explanation of this exemption from formal publication requirements for rules within Section 3-116. Such a compilation can simply be a typed loose-leaf notebook that is the agency's official rulebook for these exempted rules.

The compilation required by this subsection must be made available for public inspection and copying except for those particular portions containing rules within Section 3-116(2). Because secret law is wholly inconsistent with normal concepts of fair play, this exemption from the right of public access to agency rules is of very limited scope, and is justified only because of compelling practical reasons. See Bonfield, IAPA at 785-791. Note that, according to paragraph (2), discussed next, persons with actual timely notice of rules required to be included in this compilation are subject to them for all purposes even if they are not included therein. This should add to the practicality and reasonableness of the requirements of this subsection.

Paragraph (2) of subsection (g) states that rules subject to this subsection are not invocable to the detriment of any person until the enumerated very minimal and easy to meet requirements of paragraph (1) of the subsection are fully satisfied. The actual timely knowledge exception is based on 1961 Revised Model Act, Sections 2(a)(3) and 2(b), and Iowa Act, Sections 17A.3(1)(c) and 3(2). See Bonfield, IAPA at 785-790 and 799-804 for a full discussion of their rationale. See also Section 2-102(b) of this Act and the Comments thereto for another similar provision. The emergency exception to the main rule of paragraph (2) contains the same standard as that found in Section 3-115(b)(2)(iv). See the Comments on that provision. Note that paragraph (2), like the rest of subsection (g), only applies to rules subject to Section 3-116. The provisions of this paragraph need not apply to other rules. All other rules are subject to several similar requirements contained in Section 3-115 that assure easy and timely public access to them. See also the additional duty imposed on an agency in subsection (f) of this section to make a copy of the published, indexed, and otherwise widely available formal rule compilations, as they pertain to that agency, available for public inspection at its own offices.

1. SECTION 2-102. [Public Inspection and Indexing of Agency Orders.]
2. (a) In addition to other requirements imposed by any provision of law,
3. each agency shall make available for public inspection and copying, and index by
4. name and subject, all written final orders. An agency shall delete from those
5. orders identifying details to the extent required by any provision of law or
6. necessary to prevent a clearly unwarranted invasion of privacy or release of
7. trade secrets. In each case the justification for the deletion must be
8. explained in writing and attached to the order.
9. (b) A written final order may not be relied on as precedent by an
10. agency to the detriment of any person until it has been made available for
11. public inspection and indexed in the manner described in subsection (a). This
12. provision is inapplicable to any person who has actual timely knowledge of the
13. order. The burden of proving that knowledge is on the agency.



## COMMENTS

This section is a substantially modified version of 1961 Revised Model Act, Sections 2(a)(4) and 2(b), and the additions thereto found in Iowa Act, Sections 17A.3(1)(d) and 3(2). The section is dedicated to the elimination of secret law. See generally Bonfield, IAPA at 791-804 for a full discussion of all its various provisions and the manner of their operation.

Subsection (a) requires that all written final orders rendered in adjudications, including declaratory orders, be indexed in two ways and be made available for public inspection. Note that as drafted, the indexing and public inspection requirement applies to such orders issued before the effective date of the Act as well as thereafter. The theory is that all of the precedents on which agencies rely as binding law should be readily available to the public regardless of the date of their creation. After all, the injury to affected persons unable to ascertain the precedents on which an agency relies is not dependent on the age of those precedents.

Subsection (b) provides a remedy for violation of this section. It states that conformance with all of the requirements of subsection (a) is normally necessary before an order may be relied on by an agency as precedent in another case, to the detriment of any of the parties thereto. Of course, this remedy may be difficult to use effectively in situations where an agency relying upon an unindexed or unavailable precedent successfully conceals that fact, purporting instead to adjudicate wholly de novo in the case at hand the principle embedded in the earlier concealed precedent. On the preconditions to the direct effectiveness of an agency order against parties or other persons, rather than the preconditions to its use only as precedent in later cases, see Section 4-220.

1. SECTION 2-103. [Declaratory Orders.]

2. (a) Any person may petition an agency for a declaratory order as to  
3. the applicability to specified circumstances of a statute, rule, or order  
4. within the primary jurisdiction of the agency. In response to a petition  
5. therefor, an agency shall issue a declaratory order unless it determines that  
6. issuance of the order under the circumstances would be contrary to a rule  
7. adopted in accordance with subsection (b). However, an agency may not issue  
8. a declaratory order that would substantially prejudice the rights of a person  
9. who would be a necessary party and who does not consent to the determination  
10. of the matter by a declaratory order proceeding.

11. (b) Each agency shall issue rules that provide for:

12. (i) the form, contents, and filing of petitions for declaratory  
13. orders;



14. (ii) the procedural rights of persons in relation thereto; and

15. (iii) the disposition of such petitions.

16. Those rules must include a description of the classes of circumstances in  
17. which the agency will not issue a declaratory order, and must be consistent  
18. with the public interest and with the general policy of this Act to facilitate  
19. and encourage agency issuance of reliable advice.

20. (c) After receipt of a petition for a declaratory order, an agency  
21. shall, within [15] days, give notice of the petition to all persons to whom  
22. notice is required by any provision of law, and may give notice to any other  
23. persons it deems desirable.

24. (d) Persons who qualify under the provisions of Section 4-209(a)(2)-(3)  
25. and who file timely petitions for intervention according to agency rules,  
26. shall be permitted to intervene in proceedings for declaratory orders. Other  
27. provisions of Article IV apply to agency proceedings for declaratory orders  
28. only to the extent an agency so provides by rule or order.

29. (e) Within [30] days after receipt of a petition for a declaratory order  
30. an agency, in writing, shall:

31. (1) issue an order declaring the applicability of the statute, rule,  
32. or order in question to the specified circumstances;

33. (2) set the matter for specified proceedings;

34. (3) agree to issue such an order by a specified time; or

35. (4) decline to issue a declaratory order, stating the reasons  
36. for its action.

37. (f) A copy of all orders issued in response to a petition for a declara-  
38. tory order must be mailed promptly to petitioner and any other parties.

39. (g) A declaratory order has the same status and binding effect as any other  
40. order issued in an agency adjudicative proceeding.

41. (h) A petitioner may seek judicial review of an agency's failure to issue  
 42. a declaratory order if the agency has declined to issue such an order, or has  
 43. not issued such an order within [60] days after receipt of the petition therefor.

## COMMENTS

This section is an expanded and substantially modified version of 1961 Revised Model Act, Section 8. The purposes of this section are to provide individuals with fully reliable information as to the applicability of agency administered law to their particular circumstances, to avoid irreparable injury to persons subject to agency administered law, and to prevent needless litigation. See generally, Bonfield, IAPA at 805-824. It does, however, prohibit an agency from issuing a declaratory order that would substantially prejudice the rights of any persons who would be indispensable -- that is "necessary" -- parties, and who do not consent to the determination of the matter by a declaratory order proceeding. Such persons may refuse to give that consent because in a declaratory order proceeding they might not have all of the same procedural rights they would have in another type of adjudicatory proceeding to which they would be entitled.

As subsection (b) indicates, each agency is required to issue rules specifying all of the details surrounding the declaratory order process including a specification of the precise form and contents of the petition; when, how, and where such petitions are to be filed; whether petitioners have rights to oral arguments in relation thereto; the circumstances in which the agency will not issue such an order; and the like. Agency rules on this subject will be valid so long as the requirements they impose are reasonable and are within the scope of agency discretion. To be valid these rules must also be consistent with the public interest -- which includes the efficient and effective accomplishment of the agency's mission -- and the express general policy of this Act to facilitate and encourage the issuance of reliable agency advice. So, as subsection (a) makes clear, an agency must issue a declaratory order upon receipt of a proper petition therefor unless it determines that under the particular circumstances its issuance would either (1) be contrary to a rule issued in accordance with subsection (b), or (2) would substantially prejudice the rights of any persons who would be indispensable parties to the proceeding and do not consent to determination of the matter by a declaratory order.

Subsection (c) requires an agency to give timely notice of a petition for a declaratory order to such persons as is required by law, and also authorizes the agency to give notice of a petition on an ad hoc basis to other persons it thinks desirable.

Subsection (d) makes clear that an agency must allow persons to intervene in a declaratory order proceeding to the same extent it must allow such intervention in other adjudicatory proceedings under the provisions of this Act. It also makes clear that all the other specific procedural requirements for adjudications imposed by this Act on agencies when they conduct such proceedings are inapplicable to proceedings for declaratory orders unless an agency elects to make some or all of them applicable. As subsection (b) indicates, each agency is to specify the precise procedures available in such proceedings by rule. In particular cases, it may grant additional procedural rights by order. The reason



for exempting declaratory orders from usual procedural requirements for adjudications provided in Article IV is to encourage agencies to issue such orders by eliminating any requirements in relation thereto that they might deem onerous. Note that there are no contested issues of fact in declaratory order proceedings. Note also that the party requesting a declaratory order has the choice of refraining from filing such a petition and awaiting the ordinary agency adjudicative process governed by Article IV. Declaratory orders are, of course, subject to the provisions of this Act for judicial review of agency orders and for public inspection and indexing of agency orders.

The requirement in subsection (e) that an agency dispose of a petition within 30 days defines the outer limits of "prompt disposition," which was the time period used in 1961 Revised Model Act, Section 8. This assures timely agency responses to declaratory ruling petitions, thereby facilitating planning by affected parties.

Subsection (f) requires that the agency communicate all orders relating to such a petition to the petitioner and any other parties. According to subsection (e)(4), when the agency declines to issue a declaratory order it must include therein a statement of the precise grounds for that disposition. This statement of reasons will help to assure that the propriety of the denial of such a declaratory order in the circumstances will be carefully considered by the agency, and that the courts will have an opportunity for meaningful review of all negative agency responses to such a petition. If the agency improperly refuses to issue a declaratory order because it acts beyond the scope of authority granted it, or abuses its discretion, the reviewing court must remand to the agency with directions to issue such an order. The court may not render a declaratory judgment determining the applicability of law within the agency's primary jurisdiction to the facts contained in the petition. See P.E.R.B. v. Stohr, 279 N.W.2d 286 (Iowa 1979).

Subsection (g) is a revised and expanded version of 1961 Revised Model Act, Section 8. It makes clear that agency declaratory rulings are judicially reviewable; are binding on the petitioner, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and that they have the same precedential effect as other agency adjudications. See Bonfield, IAPA at 822-824.

Subsection (h) is based on Iowa Act, Section 17A.19(1). It eliminates the uncertainty as to when agency action or inaction with regard to a declaratory order petition is final for purposes of judicial review. Sixty days seems reasonable for this purpose since an agency should be allowed sufficient time to hold any proceedings it desires on such a petition before petitioner can file proceedings for judicial review.

1. SECTION 2-104. [Required Rule Making.]
2. In addition to other rule-making requirements imposed by any provision of
3. law, each agency shall:



4.           (1) adopt as a rule a description of the organization of the  
5. agency which states the general course and method of its operations and  
6. how and where the public may obtain information or make submissions  
7. or requests;

8.           (2) adopt rules of practice setting forth the nature and  
9. requirements of all formal and informal procedures available to the public,  
10. including a description of all forms and instructions that are to be used  
11. by the public in dealing with the agency;

12.           (3) as soon as feasible and to the extent practicable, adopt  
13. rules in addition to those otherwise required by this Act, embodying appropriate  
14. procedural safeguards, and standards and principles which the agency will  
15. apply to the law it administers; and

16.           [(4) as soon as feasible and to the extent practicable, adopt rules  
17. to supersede principles of law or policy lawfully declared by the agency as the  
18. basis for its decisions in particular cases.]

## COMMENTS

Paragraph (1) is modified 1961 Revised Model Act, Section 2(a)(1).  
See Bonfield, IAPA at 781-784.

Paragraph (2) is modified 1961 Revised Model Act, Section 2(a)(2).  
See Bonfield, IAPA at 784-785.

Paragraph (3) is an effort to force agencies, "as soon as feasible and to the extent practicable," to further structure their procedural and substantive discretion so as to minimize arbitrary action and give fair notice to the public. See Holmes v. N.Y. Housing Authority, 398 F.2d 262 (2nd Cir. 1968); K. Davis, "A New Approach to Delegation," 36 Univ. Chicago L. Rev. 713 (1969); 1 K. Davis, Administrative Law Treatise, Section 3:15 (2d ed. 1978). Of course, the issuance of rules is not the only means by which to accomplish this goal. But several reasons favoring policy making by rule rather than by ad hoc order are noted in the later portion of the Comments explaining paragraph (4). Among them is the fact that there is greater ease of public access to law embodied in widely disseminated published rules as compared to law embodied in unpublished orders which are only available in the agency's office for public inspection. In addition, it should be stressed that policy making by rule is prospective, thereby giving affected persons advance warning while policy making by adjudication is inherently retrospective, thereby denying

parties advance warning. See NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). These factors suggest that to the extent an agency can feasibly and practicably further structure its discretion by rule to avoid arbitrary action, and to give fair advance notice to the public of the precise content of the law it administers, the agency should be required to do so.

Illinois Act, Section 1004.02, is somewhat similar to paragraph (3). That provision states: "Each rule which implements a discretionary power to be exercised by an agency shall include the standards by which the agency shall exercise the power. Such standards shall be stated as precisely and clearly as practicable under the conditions, to inform fully those persons affected."

Bracketed paragraph (4) is a very substantially modified and mandatory form of Wisconsin Act, Section 227.014(2)(c), which states: "Each agency which is authorized by law to exercise discretion in deciding individual cases is authorized to formalize the general policies which may evolve from such decisions by adopting such policies as rules which the agency will follow until they are amended or repealed." Agencies would usually seem to have that discretionary authority in any event. See, e.g., National Petroleum Refiners Assn. v. FTC, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

A number of reasons favor a requirement that agencies displace or supersede law and policy made in the course of adjudications with rules, "as soon as feasible and to the extent practicable." As noted above, law and policy expressed in rules is more readily available to affected members of the public than case precedent and is known in advance to affected parties; therefore, law and policy expressed in rules gives them fairer notice than case precedent. In addition, the general public has an opportunity to participate in law or policy made by rule, while its opportunity to do so with respect to policy made on a case-by-case basis is much more limited. Law or policy expressed in rules is also frequently more easily understandable to laymen than case precedent, and is almost always more highly visible to those who monitor the performance of agencies. That is, neither the legislative committee charged with oversight of agency rules nor the governor may effectively monitor policy made by an agency on a case-by-case basis because the documents in which such policy is declared are much less easily accessible than are rules which are published and widely distributed; nor may the legislative committee use its objection power created in Section 3-204(d) or the governor his veto power created in Section 3-202(a) on agency policy created wholly on a case-by-case basis. When agencies realize that creation of policy on a precedential case-by-case basis can enable them to avoid the publicity and public participatory hurdles of the rule-making requirements, and the possibility of effective legislative and gubernatorial review of that policy, they are likely to increase policy making in that manner to the extent their enabling acts permit them to do so. Only by the enactment of a statutory provision of the type recommended here, therefore, can agencies be forced to codify in rules principles of law or policy they may lawfully declare in decisions in particular cases, and may lawfully rely on as precedent. Without such a provision they will be free, in many situations, to make their most controversial policies on a case-by-case basis in adjudications, and thereby avoid on a permanent basis rule-making procedures and legislative and gubernatorial review.



Consequently, insofar as "feasible," and to the extent "practicable," agencies should be required to embody in rules specified principles of law or policy developed in their case precedent that in practice and in effect have become of general applicability. Of course, the rules an agency makes to satisfy its paragraph (4) obligation need not be wholly congruent with the displaced or superseded principles of law or policy lawfully declared by the agency in particular cases as the basis for those decisions. So long as they are both substantively and procedurally within the authority delegated to the agency, paragraph (4) rules may codify, or be broader or narrower than, the case law they displace. The validity of a rule adopted pursuant to paragraph (4), therefore, will not depend upon whether or not it is an accurate codification in all respects of the replaced preexisting agency case law.

If an agency breaches, in particular circumstances, its duty which is based on a rule of reason -- "as soon as feasible and to the extent practicable" -- to issue such a rule displacing a line of its precedent, the agency may not subsequently rely on that line of precedent. Instead, it would have to readjudicate wholly de novo, and free of prior precedent, whatever principles of law might apply to those circumstances. Of course, this remedy may not be particularly effective since even in such a wholly de novo adjudication the agency would probably readjudicate the same principle of law embedded in the prior precedent upon which it could no longer lawfully rely because its paragraph (4) duty had been breached. See e.g. the result in N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969), on slightly different facts. For a somewhat different requirement read into an agency's enabling act to accomplish objectives similar to those sought by paragraph (4) -- the agency must initially particularize the statutory standards it applies by rule rather than by order -- see Megdal v. Oregon St. Bd. of Dental Examiners, 605 P.2d 273 (Oregon 1980).

As an alternative to bracketed paragraph (4), states might consider this possibility. Add a subsection to Section 3-118 that would require an agency, only after a petition requesting the adoption of a rule codifying one or more specified principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases, to adopt such a rule as soon as feasible and to the extent practicable. A provision of this type might state:

If a person petitions an agency requesting the adoption of a rule codifying specified principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases, the agency shall adopt such a rule as soon as feasible and to the extent practicable, and in accordance with the requirements of this Chapter.



1. SECTION 2-105. [Model Rules of Procedure.]

2. The [attorney general] shall adopt in accordance with the rule-making  
3. requirements of this Act model rules of procedure appropriate for use by as  
4. many agencies as possible. The model rules must deal with all general  
5. functions and duties performed in common by several agencies. Each agency  
6. shall adopt as much of the model rules as is practicable under its circum-  
7. stances. To the extent an agency adopts the model rules, it shall do so in  
8. accordance with the rule-making requirements of this Act. Any rule of  
9. procedure adopted by an agency that differs from the model rules must be  
10. accompanied by a finding stating the reasons why the relevant portions  
11. of the model rules were impracticable under its circumstances.

## COMMENTS

This section is a combination of modified Montana Act, Section 82-4203(3), and modified Utah Act, Section 63-46-11. Obviously, it is desirable to secure as much uniformity among the procedural rules of the several agencies as "is practicable" in light of their differing circumstances. Such uniformity as is feasible will ease the burden on the public of familiarizing itself with agency procedures and eliminate additional agency costs associated with adopting and implementing procedural rules with unnecessary differences. That is all this provision seeks to accomplish.

## ARTICLE III

## RULE MAKING

## CHAPTER I: ADOPTION AND EFFECTIVENESS OF RULES

## CHAPTER II: REVIEW OF AGENCY RULES

## COMMENTS

The rule-making procedures provided in Article III seek to accomplish three principal objectives. First, the procedure provided seeks to facilitate the making of rules that are as technically sound as is possible under the circumstances of everyday government operation. To that end, they are geared to elicit and to place in proper perspective for agencies all of the information and opinion necessary to make fully informed and technically correct rule-making determinations. It is assumed that a combination of the self interest of persons affected by proposed rules, an effective opportunity for them to communicate to an agency all material relevant to its proposed rules, and a process to ensure that the agency actually considers such communications and other relevant information before it adopts rules, will facilitate rule-making determinations that are technically sound.

Second, the procedure provided seeks to assure that rule-making determinations made by agencies are lawful in all respects. That is, the process is geared to keep the rule making of agencies within the bounds of their legislative authorizations. For this purpose, the requirements imposed on agencies by Article III include provisions geared to assure full agency consideration and articulation of its authority to act in each instance of rule adoption, and the creation of an official record that will facilitate effective judicial review of its legal authority to act in each such instance of rule making. In addition, this Article also provides optional legislative and gubernatorial checks geared to assure that each instance of agency rule making is lawful.

Third, the procedures provided seek to assure that rule-making determinations are democratic as well as technocratic -- that the body politic may effectively thwart the adoption of rules, no matter how technically sound and lawful, that are politically unacceptable to the community. This is a clear recognition that agencies work for the people and that the views of the community at large rather than the views of technocrats should ultimately prevail. The procedures specified in this statute for rule adoption, therefore, intentionally provide a number of practical opportunities for concerned members of the public to organize and effectively direct at agencies community political pressures against the adoption of rules they find unacceptable. The theory of those procedures is that if agencies making rules are subjected to the same kinds of political pressures as are focused on the legislature when it enacts statutes, the agencies will find themselves practically unable to adopt rules that the legislature would not have adopted because of similar considerations. And, as a final check, the rule-making process provides an optional means by which affected persons may obtain the aid of the politically responsible governor to veto lawful agency rule-making actions that are unacceptable to the wider community.



There is an urgent need for effective procedures especially formulated to assure that agency rule making is both within the scope of its delegated authority and also politically acceptable to the community at large. These objectives could, of course, be accomplished by the imposition of substantive law limitations on agencies rather than by the imposition of procedural constraints on them. In enacting statutes delegating rule-making authority to agencies the legislature could be very detailed and specific. Statutory language of that sort, coupled with the aid of the courts, would usually assure that the rule making of agencies stays within the scope of their clearly delineated substantive authority. It would also tend to assure that agencies adopt rules that are substantively similar to statutes the politically responsive legislature would have adopted had it attempted itself to solve the problems at which the agency rules are directed. However, this means of popular control over the rule-making process has largely failed. Legislatures across the country have repeatedly delegated rule-making authority to agencies without providing detailed and specific statutory standards to guide them in the exercise of that authority.

Many of the reasons for the increasing breadth and vagueness of legislative delegations of rule-making authority to administrative agencies are not hard to identify; nor are they likely to change very soon. Inadequate time and an excessive work load, lack of technical expertness coupled with thin support staffing, an inability to foresee or to agree upon the specific details of agency rule-making authority, and/or a positive conviction that broad, vague rule-making delegations are necessary to accomplish their ultimate objectives, all cause legislators to acquiesce in statutes vesting such practically uncabined authority in agencies. And despite earlier law to the contrary, there is a growing tendency today for state supreme courts to uphold the vesting of such broad rule-making authority in state agencies, so long, that is, as the delegation is at least surrounded by general standards and by adequate procedural safeguards. See e.g. 1 K. Davis, Administrative Law Treatise Section 3:14-3:15 (2d ed. 1978) and 1980 Supplement; B. Schwartz, Administrative Law Section 23 (1976).

All of this highlights the importance of rule-making procedures that not only facilitate agency policy making that is technically sound, but that also assure such agency policy making is both within the scope of agency authority and is politically acceptable to the community at large. The procedures that follow seek to accomplish these three principal objectives and several other subsidiary objectives, such as assuring affected members of the public adequate notice of, and time to adjust to, the requirements of new rules before they take effect. These procedures are proposed as a fair balance between the need for effective, efficient, and economical rule making on the one hand, and the accomplishment of the specified objectives on the other.



## CHAPTER 1: ADOPTION AND EFFECTIVENESS OF RULES

SECTION 3-101	<u>[Advice on Possible Rules Prior to Notice of Proposed Rule Adoption.]</u>	36
SECTION 3-102	<u>[Public Rule-making Docket.]</u>	36
SECTION 3-103	<u>[Notice of Proposed Rule Adoption.]</u>	38
SECTION 3-104	<u>[Public Participation.]</u>	39
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1. SECTION 3-101. [Advice on Possible Rules Prior to Notice  
 2. of Proposed Rule Adoption.]

3. (a) In addition to seeking information by other methods an agency may,  
 4. prior to the publication of a notice of proposed rule adoption under Section  
 5. 3-103, solicit comments from the public on a subject matter of possible rule  
 6. making under active consideration within the agency by causing notice to be  
 7. published in the [administrative bulletin] of the subject matter and indicating  
 8. when, where, and how persons may comment.

9. (b) Each agency may also appoint committees of interested persons  
 10. to comment, prior to the publication of a notice of proposed rule adoption  
 11. under Section 3-103, on the subject matter of a possible rule making under  
 12. active consideration within the agency. The membership of those committees  
 must be published at least [annually] in the [administrative bulletin].

COMMENTS

A voluntary prerule-making notice publication of the type authorized by subsection (a) will often save time in the long run for an agency. Such a notice will alert the agency very early in the rule-making process to problems which might later cause the agency to rewrite drastically the terms of a rule it has formally proposed by publication according to the requirements of Section 3-103, or to regret that it had been formally proposed in the first place. A prerule-making notice publication will also facilitate public access to the rule-making process before the agency commits itself psychologically to a specific text. See Auerbach, "Administrative Rulemaking in Minnesota," 63 Minn. L. Rev. 151 at 171-174 (1979), hereinafter cited as Auerbach, MAPA.

The committee consultation concept authorized by subsection (b) is a modified and extended form of Wisconsin Act, Section 227.018(1).

This section does not, of course, preclude an agency, prior to the publication of a notice of proposed rule adoption, from seeking information from the public by other methods with respect to a subject matter of possible rule making.

1. SECTION 3-102. [Public Rule-making Docket.]

2. (a) Each agency shall maintain a fully current public rule-making docket.

3. (b) The rule-making docket [must] [may] contain a listing of the precise

4. subject matter of each possible rule currently under active consideration

5. within the agency for proposal under Section 3-103, the name and address of  
6. agency personnel with whom persons may communicate with respect thereto, and  
7. an indication of the present status within the agency of that possible rule.

8. (c) The rule-making docket must contain a listing of each pending rule-  
9. making proceeding. A rule-making proceeding is pending from the time it is  
10. commenced, by publication of a notice of proposed rule adoption, to the time  
11. it is terminated, by publication of a notice of termination or the rule  
12. becoming effective. For each rule-making proceeding the docket must indicate:

13. (1) the subject matter of the proposed rule;  
14. (2) a citation to all published notices relating to the proceeding;  
15. (3) the time during which written submissions may be made;  
16. (4) where written submissions on the proposed rule may be inspected;  
17. (5) the names of persons who have made written requests for an  
18. opportunity to make oral presentations, where those requests may be inspected,  
19. and the time and location of any oral presentations;

20. (6) whether a written request for the issuance of a regulatory analysis  
21. has been filed, whether that analysis has been issued, and where the written  
22. request and analysis may be inspected;

23. (7) the current status of the proposed rule and any agency determin-  
24. ations with respect thereto;

25. (8) any known timetable for agency decisions or other action in the  
26. proceeding;

27. (9) the date of the rule's adoption;

28. (10) the date of the rule's filing, indexing, and publication; and

29. (11) when the rule will become effective.

#### COMMENTS

This provision is calculated to assure that members of the public can easily, and in one place, ascertain the full current rule-making agenda of an agency, and all pertinent information in relation thereto.



SECTION 3-103. [Notice of Proposed Rule Adoption.]

(a) At least [30] days before the adoption of a rule an agency shall cause notice of its contemplated action to be published in the [administrative bulletin]. The notice of proposed rule adoption must include:

- (1) a short explanation of the purpose of the proposed rule;
- (2) the specific legal authority authorizing the proposed rule;
- (3) the text of the proposed rule;
- (4) when, where, and how persons may present their views on the proposed rule; and
- (5) when, where, and how persons may demand an oral proceeding thereon if the notice does not already provide for one.

(b) Within [3] days after its publication in the [administrative bulletin], the agency shall cause a copy of the notice of proposed rule adoption to be mailed to each person who has made a timely request to the agency for a mailed copy of such notices. An agency may charge persons for the actual cost of providing them individual mailed copies of those notices.

## COMMENTS

This section is substantially modified 1961 Revised Model Act, Section 3(a)(1). See Bonfield, IAPA at 848-852. Unlike that Act, however, this section requires the entire text of the proposed rule, rather than just a summary, to be incorporated in the published notice. Subject only to authority conferred by Section 3-107, this provision will assure that affected parties have fully adequate warning of the precise terms of the contemplated rule before the rule is finally adopted. The availability to agencies of more general prerule-making notice publications under Section 3-101 should remove most objections to this requirement that the full text of a proposed rule be published at the time of the notice of proposed rule adoption. Of course, the text of such a proposed rule may itself incorporate certain matters by reference. See Section 3-111(b).

Unlike the 1961 Revised Model Act, this section also requires the initial notice of proposed rule adoption to indicate expressly the right of persons to demand an oral proceeding pursuant to Section 3-104.

1. SECTION 3-104. [Public Participation.]

2. (a) For at least [30] days after publication of the notice of proposed  
3. rule adoption, an agency shall afford persons the opportunity to submit in  
4. writing data, views, or arguments with respect to the proposed rule.

5. (b) (1) An agency shall schedule an oral proceeding on a proposed  
6. rule if, within [20] days after the published notice of proposed rule  
7. adoption, a written request for an oral proceeding is submitted by [the  
8. administrative rules review committee, the administrative rules counsel, a  
9. political subdivision, an agency, or [25] persons]. At that proceeding the  
10. agency shall provide an opportunity for persons to make oral argument on  
11. the proposed rule.

12. (2) An oral proceeding on a proposed rule, if required, must be  
13. not earlier than [20] days after publication in the [administrative bulletin]  
14. of a notice indicating its time and place.

15. (3) The agency, a member of the agency, or another presiding  
16. officer designated by the agency, shall preside at a required oral proceeding  
17. on a proposed rule. If the agency does not preside, the presiding official  
18. shall prepare a memorandum for consideration by the agency summarizing the  
19. contents of the presentations made at the oral proceeding. Oral proceedings  
20. must be open to the public and be recorded by stenographic or mechanical means.

21. (4) Each agency shall issue rules for the conduct of oral rule-  
22. making proceedings. Those rules may include provisions calculated to prevent  
23. undue repetition in the oral proceedings.



## COMMENTS

Subsections (a) and (b)(1) are modified and extended versions of 1961 Revised Model Act Section 3(a)(2). Significant changes include a specification of a number of days within which persons have a right to submit written comments; use of the terms "oral proceeding" and "oral argument" for the more ambiguous and troublemaking word "hearing," see U.S. v. Florida East Coast R. Co., 410 U.S. 224 (1973); and the addition of a legislative committee and the administrative rules counsel to those who may induce such an oral proceeding. The terms "oral proceeding" and "oral argument" make it clear that there is no right under this statute to a trial-type hearing before an agency in the making of rules. For an explanation of the undesirability of any requirement for trial-type hearings on most rules of general applicability, see Hamilton, "Procedure for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rule making," 60 Calif. L. Rev. 1276 (1972); 2 Recommendations and Reports of the Administrative Conference of the U.S. 66 (1970-1972), Recommendation 72-5. See also Bonfield, IAPA at 852-856. As drafted, therefore, the statute only contemplates that in specified situations some sort of an "oral proceeding" must be made available in rule making, and that in most cases the proceeding will be legislative rather than adjudicative in form. Of course, these provisions do not preclude an agency from exercising its discretion to allow a legislative-type of oral proceeding on the adoption of a rule in situations where it is not required by this section; nor do they preclude an agency from allowing a trial-type proceeding on the desirability of adopting a rule if the agency chooses to do so.

The identity of those who may trigger a required oral rule-making proceeding is bracketed. Each state, therefore, will have to consider independently the identity of those who may induce such a proceeding. If all of the bracketed suggestions are enacted, however, it will obviously be very easy for persons who are upset about a proposed rule to invoke this requirement. But it seems unwise to require an oral proceeding in all cases of rule making. The costs imposed by such a universal requirement would seem to outweigh any potential benefits.

Subsection (b)(2) adds to the 1961 Revised Model Act a requirement that notice of the time and place of any oral proceeding be published a specified time before it is held. Note that an agency may substantially compress the period necessary for adoption of a rule by including in the original notice of proposed rule adoption an indication of the time and place of an oral argument-style proceeding thereon, rather than waiting for a request that would make such a proceeding mandatory and then publishing advance notice of the proceeding's time and place.

Subsection (b)(3)-(4) adds to the 1961 Revised Model Act provision an explicit designation of the persons who may preside at oral rule-making proceedings; a requirement that a written report on those oral proceedings be prepared by the presiding officer if the agency did not preside; a requirement for the making of a record of required oral presentations; and a clear authorization for agencies to keep control over the oral proceedings by reasonable rules issued for that purpose. Nothing in the subsection requires the agency to transcribe the record, although any member of the public may do so at his or her own expense.

Like Section 3-101, this provision does not preclude an agency from seeking information from the public on a formally proposed rule by means that are in addition to those specified herein.



1. SECTION 3-105. [Regulatory Analysis.]

2. (a) An agency shall issue a regulatory analysis with respect to a proposed  
3. rule if, within [20] days after the published notice of proposed rule adoption,  
4. a written request for the analysis is filed in the office of the [secretary of  
5. state] by [the administrative rules review committee, the governor, a political  
6. subdivision, an agency, or [300] persons signing a single request]. A certified  
7. copy of the filed request must be forwarded immediately by the [secretary of  
8. state] to the agency.

9. (b) Except to the extent that the written request expressly waives  
10. any one or more of the following, the regulatory analysis must contain:

11. (1) a description of the classes of persons who probably will be  
12. affected by the proposed rule, including classes that will bear the costs of  
13. the proposed rule and classes that will benefit from the proposed rule;

14. (2) a description of the probable quantitative and qualitative  
15. impact of the proposed rule, economic or otherwise, upon affected classes  
16. of persons;

17. (3) the probable costs to the agency and to any other agency of  
18. the implementation and enforcement of the proposed rule and any anticipated  
19. effect on state revenues;

20. (4) a comparison of the probable costs and benefits of the  
21. proposed rule to the probable costs and benefits of inaction;

22. (5) a determination of whether there are less costly  
23. methods or less intrusive methods for achieving the purpose of the proposed  
24. rule; and

25. (6) a description of any alternative methods for achieving the purpose  
26. of the proposed rule that were seriously considered by the agency and the  
27. reasons why they were rejected in favor of the proposed rule.

28. (c) Each regulatory analysis must include quantification of the data to  
29. the extent practicable and must take account of both short-term and long-term  
30. consequences.

31. (d) A concise summary of the regulatory analysis must be published in the  
32. [administrative bulletin] at least [10] days before the earliest of:

33. (1) the end of the period during which persons may make written  
34. submissions on the proposed rule;

35. (2) the end of the period during which an oral proceeding may be  
36. requested; and

37. (3) the date of any required oral proceeding on the proposed rule.

38. (e) The published summary of the regulatory analysis must also indicate  
39. where persons may obtain copies of the full text of the regulatory analysis and  
40. when, where, and how persons may present their views on the rule in question  
41. and demand an oral proceeding thereon if one is not already provided.

42. (f) The lawfulness of a rule may not be challenged on the ground that the  
43. contents of the regulatory analysis are insufficient or inaccurate.

#### COMMENTS

This section is a very substantially modified and extended Florida Act, Section 120.54(2)(a). See also Iowa Act, Section 17A.4(1)(c). The preparation of such a regulatory analysis is clearly very burdensome. It is also hazardous because of the large potential for disagreement about the accuracy of its contents. Furthermore, the right to require the issuance of such a regulatory analysis in particular instances of rule making could be subject to great abuse. In light of this, states may want to require its issuance only upon demand by directly elected officials with general responsibility for state government. The governor and/or a legislative committee specially charged with administrative agency oversight are the most obvious examples of politically responsible state officials of this type. In subsection (a) the directly politically responsible state officials entitled to make the requirement operative in a given case of rule making are bracketed so that each state may determine independently how it wants to solve that problem. Some states may also wish to permit members of the public and/or other agencies or political subdivisions to invoke



this requirement even though there is a danger that such a power in the hands of those persons might be abused. For these states, other bracketed alternatives are included. In states desiring to permit members of the public to invoke this requirement, consideration might also be given to authorizing a waiver of the requirement in particular cases by the administrative rules review committee or the governor once it has been invoked by members of the public. A waiver device of this kind might act as an effective check on invocation of the regulatory analysis requirement by members of the public seeking only to delay issuance of a clearly justifiable rule or to harass the issuing agency.

The regulatory analysis is, however, an important device with which to assure sound agency consideration of the desirability of a rule. It is also a useful device to help assure public support for, or opposition to, a rule, to the extent either is warranted, based upon a fully public description of its potential costs and benefits.

The regulatory analysis will not be helpful if, by the time it is issued, the period for public participation on the rule has already passed. To assure full utility for the analysis, therefore, subsection (d) establishes a minimum period between publication of a concise summary of the analysis and the time when the public may make written comments on the rule, demand an oral proceeding thereon, or participate in such an oral proceeding if one is held on that rule. If the demand for the regulatory analysis comes at the end of the 20 day period provided for in subsection (a), this provision will have the effect of extending the time when the conditions specified in subsections (d)(1), (2), and (3) may occur under other provisions of this Act. Note, however, that an agency desiring to avoid delays in a rule-making proceeding because of the requirements of subsection (d) may voluntarily issue such an analysis at the time it publishes the notice of proposed rule adoption and include the summary thereof as part of the original notice, rather than waiting for a subsequent written request for such an analysis.

All that is required under this provision is a good faith effort by the agency to predict the consequences of its proposed rule. Obviously, such predictions cannot be executed with any guaranteed precision. As a result, subsection (e) removes the sufficiency and accuracy of the contents of such a required regulatory analysis from the judicial review process relying, instead, on the political muscle of the administrative rules review committee and the governor to assure good faith compliance with this requirement when either of them makes it applicable to the proceeding in question. If judicial review of the adequacy of the contents of the regulatory analysis were permitted as a basis upon which to attack the validity of a rule, it could be used as a means of harassing agencies and unduly delaying their rule-making efforts. But note that if the agency fails to issue the analysis after a proper request, or fails to live up to other requirements regarding the analysis imposed by this section, that may be grounds for judicial invalidation of the rule. Subsection (f) only removes the "insufficiency" and the "inaccuracy" of the "contents" of that regulatory analysis as a basis for the invalidation of a rule.



SECTION 3-106. [Time and Manner of Rule Adoption.]

1. SECTION 3-106. [Time and Manner of Rule Adoption.]
2. (a) An agency may not adopt a rule until expiration of the period for
3. making written submissions and oral presentations thereon has expired.
4. (b) Within [180] days following (i) publication of the notice of proposed
5. rule adoption, or (ii) the end of oral proceedings thereon, an agency shall
6. adopt a rule pursuant to the rule-making proceeding or terminate the proceed-
7. ing by publication of a notice to that effect in the [administrative bulletin].
8. (c) Before the adoption of a rule, an agency shall consider the written
9. submissions, and oral submissions or any memorandum summarizing oral submissions,
10. and any regulatory analysis, provided for by this Chapter.
11. (d) Within the scope of its delegated authority, an agency may utilize
12. its own experience, technical competence, specialized knowledge, and
13. judgment in the adoption of a rule.

## COMMENTS

Subsection (a) makes explicit that which provisions of the 1961 Revised Model Act and other provisions of this Act only imply.

Subsection (b) is a modified form of Iowa Act, Section 17A.4(1)(b). On occasion, an agency has published notice of proposed adoption of a rule, encountered a furor which prevented further action at that time on the proposed rule, waited a year or two until people forgot about the proposed rule because they assumed it was dead, and then suddenly adopted the proposed rule. This subsection assures that an agency may not use undue delay between publication of a notice of proposed rule adoption and actual adoption of a rule pursuant thereto as a means of defusing or circumventing widespread public opposition to its action. See Bonfield, IAPA at 857-858.

Subsection (c) is a modified form of 1961 Revised Model Act, Section 3(a)(2), dropping the words "fully all" after the word "consider" on the ground that they are redundant.

Subsection (d) is a modified form of 1961 Revised Model Act, Section 10(4), which is applicable only to an agency's findings of fact in formal adjudicatory proceedings. There is no reason that the same explicit deference to agency experience, technical competence, specialized knowledge, and judgment should not also be applicable explicitly to its formulation of policies of general applicability "within the scope of its delegated authority."

1. SECTION 3-107. [Variance between Adopted Rule and Published Notice of  
2. Proposed Rule Adoption.]

3. (a) An agency may not adopt a rule that is substantially different from  
4. the proposed rule contained in the published notice of proposed rule adoption.  
5. However, this subsection does not preclude an agency from terminating a rule-  
6. making proceeding and commencing a new rule-making proceeding for the purpose  
7. of adopting a substantially different rule.

8. (b) In determining whether an adopted rule is substantially different  
9. from the published proposed rule upon which it is required to be based, the  
10. following must be considered:

11. (1) the extent to which all persons affected by the adopted rule  
12. should have understood that the published proposed rule would affect their  
13. interests;

14. (2) the extent to which the subject matter of the adopted rule or  
15. the issues determined therein are different from the subject matter or issues  
16. that were involved in the published proposed rule; and

17. (3) the extent to which the effects of the adopted rule differ from  
18. the effects that would have occurred if the published proposed rule had been  
adopted instead.

COMMENTS

Subsection (a) draws upon Minnesota Act, Section 15.052(4), for the "substantially different" language. Subsection (b) does not eliminate all ambiguity as to the meaning of "substantially different"; but it does create a more specific functional test relating the acceptability of any changes in the proposed rule as compared to the adopted rule to the extent to which affected parties have received fair notice by the proposed rule publication. See Auerbach, MAPA at 197-203. See also Alaska Act, Section 44.62.200(b) stating that an adopted rule may vary in content from the previously published advance notice of rule making "if the subject matter of the regulation remains the same and the original notice was written so as to assure that members of the public are reasonably notified of the proposed subject of agency action in order for them to determine whether their interests could be affected by agency action on that subject."



SECTION 3-108. [General Exemption from Public Rule-making Procedures.]

(a) To the extent an agency for good cause finds that one or more of the requirements of Sections 3-103 through 3-107 would be unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, those requirements do not apply. The agency shall incorporate the required finding and a brief statement of the reasons therefor in each rule adopted in reliance upon this subsection.

(b) In an action contesting a rule adopted in reliance upon subsection (a), the burden is upon the agency to demonstrate that any omitted requirements of Sections 3-103 through 3-107 were impracticable, unnecessary, or contrary to the public interest in the particular circumstances involved.

(c) Within [2] years after the effective date of a rule adopted in reliance upon subsection (a), the [administrative rules review committee or the governor] may request the agency to hold a rule-making proceeding thereon according to all of the requirements of Sections 3-103 through 3-107. The request must be in writing and filed in the office of [the secretary of state]. A certified copy of the filed request must be forwarded immediately by the [secretary of state] to the agency and to the [administrative rules editor]. Notice of the filing of the request must be published in the next issue of the [administrative bulletin]. The rule in question ceases to be effective [180] days after the request is filed. However, nothing in this subsection precludes an agency, after the filing of the request, from subsequently adopting an identical rule in a rule-making proceeding conducted in accordance with the provisions of Sections 3-103 through 3-107.



## COMMENTS

Subsection (a) is a modified form of Iowa Act, Section 17A.4(2), and Federal Act, Section 553(b)(B). It is more flexible and, therefore, superior to the "imminent peril to the public health, safety, or welfare" standard found in 1961 Revised Model Act, Section 3(b). See Bonfield, IAPA at 860-873. See also cases interpreting "unnecessary, impracticable, and contrary to the public interest" in Annot., 45 A.L.R. Fed. 12, 74-97 (1979).

Subsection (b) is a modified form of Iowa Act, Section 17A.4(2). It dispenses with the usual presumption of administrative procedural propriety in a case where an agency relies upon the subsection (a) exemption. This shifted burden of persuasion will hopefully make abuse of this exemptive provision infrequent because the consequences facing an agency if it guesses incorrectly are too serious to justify the risk of using the exemption in close or unclear cases. See Bonfield, IAPA at 870-871. The Federal Act does not employ this shifted burden of persuasion concept when a federal agency resorts to the "impracticable, unnecessary, or contrary to the public interest" exemption.

Subsection (c) is a modified form of Iowa Act, Section 17A.4(2). It seems wiser than limiting all rules issued under the subsection (a) exemption to a specified short effectiveness period. For some rules, usual procedures will be "impracticable, unnecessary, or contrary to the public interest" at the time they are initially issued and also at all times thereafter. The approach of subsection (c), therefore, is to allow an agency properly using subsection (a) to issue permanent rules thereunder, subject only to a formal objection to that procedure in a particular instance. Such an objection by a politically responsive body or official would turn the permanent rules issued under this general exemption into rules of very limited duration, forcing the agency to conduct a usual rule-making proceeding on those rules if the agency wishes them to remain effective for a longer period.

The identity of the politically responsible officials with the authority to turn a permanent rule properly issued under subsection (a) into a temporary rule, if a proper request is made within 2 years of the rule's effective date, is bracketed because each state should independently consider who should be designated for this purpose. Although arguable, such a power vested in a legislative committee or the governor or other persons is unlikely to be considered an undue delegation of legislative authority or a violation of separation of powers. Note in this regard the very limited effect of such a filed objection. The objection only forces the agency to engage in a standard rule-making proceeding. It does not prevent an agency from adopting such a rule of unlimited duration by usual procedures. Note also that the 2 year period within which such a request must be filed if it is to be effective is similar to the 2 year period contained in Section 3-113(b) during which a rule may be contested on the grounds of its noncompliance with any of the provisions of this Chapter.

1. [SECTION 3-109. [Exemption for Certain Rules.]

2. (a) An agency need not follow the provisions of Sections 3-103 through  
3. 3-108 in the adoption of a rule that only defines the meaning of a statute or  
4. other provision of law or precedent, if the agency does not possess delegated  
5. authority to bind the courts to any extent with its definition. A rule adopted under  
6. this subsection must include a statement to that effect when it is published in the  
7. [administrative bulletin], and there must be an indication to that effect adja-  
8. cent to the rule when it is published in the [administrative code].

9. (b) The lawfulness of a rule within the scope of subsection (a) that  
10. is adopted without complying with the provisions of Sections 3-103 through  
11. 3-108 is to be determined by a reviewing court wholly de novo.]

COMMENTS

Subsection (a) describes the type of rule usually referred to as an "interpretative rule." The definition of such a rule contained in that subsection is standard. See 2 K. Davis, Administrative Law Treatise, Sections 7:8-7:14 (2d ed. 1978); Bonfield, "Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.," 23 Admin. L. Rev. 101 at 108 (1971). Because the legislature did not delegate to the agency authority to bind courts to any extent with interpretations embodied in interpretative rules, a court is free, if it chooses, to review those rules wholly de novo, completely substituting its judgment for that of the agency as to the correctness of the interpretation embodied in such a rule. That is, since the legislature did not delegate to the agency authority to issue such interpretations that have the binding force of law, the reviewing court is not required to give any deference whatsoever to the agency interpretation. Under the subsection (a) definition, a rule embodying only the understanding of an agency as to the applicability to specified factual situations of a provision of law subject to the primary jurisdiction of that agency is normally not an interpretative rule. Legislatures typically delegate to agencies a degree of discretion with respect to applicability judgments, requiring reviewing courts to give at least some deference to agency judgments of that type. See Gray v. Powell, 314 U.S. 402 (1941); N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944).

Subsection (a) exempts interpretative rules only from the mandatory advance published notice and public participation requirements for rules. It does not exempt them from publication or other requirements applicable to rules. The concept embodied in subsection (a) is found in Federal Act, Section 553(d)(2). There are a number of justifications for this exemptive provision. The practical effectiveness of any available remedy for a procedurally improper agency issuance of an interpretative rule is in doubt. For even if a court voided an improperly issued interpretative rule, the agency could still ad hoc construe the law interpreted by the void rule and apply that ad hoc construction of the law to the particular case at hand. Furthermore, courts may, although they do not in practice always choose to do so, judicially review an interpretative



rule wholly de novo, that is, without any deference to the adopting agency. See 2 K. Davis, Administrative Law Treatise, Section 7:13 (2d ed. 1978); Cooper, State Administrative Law, 787-788 (1965); West Des Moines Ed. Assn. v. P.E.R.B., 266 N.W.2d 118 (Iowa 1978). So, the adverse consequences of such a rule on the affected persons are normally less than the consequences of a legislative rule. In addition, agencies should be encouraged to issue as many interpretative rules as possible in order to give the public full and fair notice of the specific content of the laws they administer. But requiring agencies to follow usual procedures for interpretative rules will discourage rather than encourage their issuance. Lastly, the large burden of following usual procedures for all interpretative rules may not be worth the cost in any event. See Bonfield, "Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.," 23 Admin. L. Rev. 101 (1971); Bonfield, IAPA at 858-860; Auerbach, MAPA at 158-160. To the extent practicable, of course, each agency should voluntarily follow the procedures provided in Sections 3-103 through 3-108 in the process of adopting such interpretative rules. Section 3-109 only makes it clear that agencies are not required to do so.

It should be noted, however, that all of Section 3-109 is bracketed. There are two reasons for this. First, although the agencies in almost all states act in their daily practice as if interpretative rules are entirely exempt from the rule-making requirements of their state administrative procedure acts, the 1961 Revised Model Act and most state acts do not contain such an exemption for interpretative rules. Second, one scholar has recently questioned the soundness of entirely excluding from any right of public comment all interpretative rules because some of them may have a substantial impact on the public even though courts are free to review them entirely de novo. See Asimow, "Public Participation in the Adoption of Interpretative Rules and Policy Statements," 75 Mich. L. Rev. 520 (1977).

Subsection (b) seeks to balance the dangers of any exemption of interpretative rules from usual rule-making procedures with a provision for mandatory close judicial scrutiny of the correctness of such interpretative rules when an agency bypasses usual rule-making procedures in their issuance. That is, in all cases involving the validity of interpretative rules issued without benefit of public participation, this provision requires the courts to review the agency's interpretation of the law construed by the rule wholly de novo, with no deference of any sort to the agency construction. An agency issuing an interpretative rule without following usual rule-making procedures must, according to subsection (a), indicate that fact in the adopted rule when it is published in the "administrative bulletin." That fact must also be noted adjacent to the rule when it is published in the "administrative code." This published notice is important because it will alert affected persons that if they challenge the rule in a suit, the court will determine its validity wholly de novo as subsection (b) provides.

1. SECTION 3-110. [Concise Explanatory Statement.]
2. (a) At the time it adopts a rule, an agency shall also issue a concise
3. explanatory statement containing:
4. (1) its reasons for adopting the rule;
5. (2) the arguments for and against the rule considered by the



6. agency;

7. (3) its reasons for rejecting the arguments against adoption of the  
8. rule; and

9. (4) an indication of any change between the text of the proposed rule  
10. contained in the published notice of proposed rule adoption and the text of  
11. the rule as finally adopted, with the reasons for any change.

12. (b) In determining the lawfulness of an agency rule, a court should  
13. consider in support of the rule only those reasons on which the agency relied  
14. in its explanatory statement, and only those representations made by the  
15. agency that are consistent with its explanatory statement.

#### COMMENTS

Subsection (a) is a substantially modified and expanded 1961 Revised Model Act, Section 3(a)(2). It makes mandatory a requirement that is operative only on demand by an "interested person" under that Act. Paragraph (4) is a modified form of Missouri Act, Section 536.021(5)(3). It assures an explanation for any changes made by the agency in the proposed rule when it is finally adopted.

Subsection (b) explicitly establishes in the rule-making context the existing principle that agencies are bound by the contemporaneous reasons they formally assign for their action, and any contemporaneous representations they formally make in relation thereto, and may not later seek to justify their action on the basis of different reasons or contradictory representations. There are several reasons why agencies should not be permitted to use post hoc reasons or post hoc inconsistent representations to rescue agency action which was unsupportable on the basis of the specific formal reasons given and representations made when it was originally taken. If agencies had the right to rely on post hoc reasons and inconsistent representations they would be encouraged to offer at a later time false, but convenient, rationalizations for their earlier otherwise unsupportable action. Such a right would also allow agencies to make rules in a way that would entirely remove from the scrutiny of the rule-making process those later justifications which ultimately become the basis for upholding the rule. In addition, it would undesirably protect agencies from any adverse consequences for their improper failure to consider carefully, prior to the time they take rule-making action, all of the reasons why they should or should not take that action. See Bonfield, IAPA at 856-857; Rodway v. U.S. Dept. of Agriculture, 514 F.2d 809 (D.C. Cir. 1975); SEC v. Chenery Corp., 318 U.S. 80 (1943), 332 U.S. 194 (1947); Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, Inc., 435 U.S. 519 at 549 (1978). Even absent a statutory requirement, some courts are demanding an equivalent statement by agencies in rule making, and holding the agencies to its contents, as a means of facilitating meaningful judicial review of rules. See Tri-State Generation and Transmission Assn. v. Environmental Quality Council, 590 P.2d 1324 (Wyoming 1979). Compare Section 3-112(c) of this Act and its Comments regarding the nonexclusivity of the rule-making record with the requirement in this section of the exclusivity of an agency's contemporaneous formal reasons for a rule and formal representations in relation thereto.

1. SECTION 3-111. [Contents, Style, and Form of Rule.]

2. (a) Each rule adopted by an agency must contain the text of the rule and:

3. (1) the date the agency adopted the rule;

4. (2) a concise statement of the purpose of the rule;

5. (3) a reference to all rules repealed, amended, or suspended by the  
6. rule;7. (4) a reference to the specific statutory or other authority  
8. authorizing adoption of the rule;9. (5) any findings required by any provision of law as a precondition  
10. to adoption or effectiveness of the rule; and11. (6) the effective date of the rule if other than that specified  
12. in Section 3-115(a).13. (b) An agency may incorporate, by reference in its rules and without  
14. publishing the incorporated matter in full, all or any part of a code, standard,  
15. rule, or regulation that has been adopted by an agency of the United States,  
16. of this State, or another state, or by a nationally recognized organization  
17. or association, if incorporation of its text in agency rules would be unduly  
18. cumbersome, expensive, or otherwise inexpedient. The reference in the agency  
19. rules must fully identify the incorporated matter by date, location, and  
20. otherwise, [and must state that the rule does not include any later amendments  
21. or editions of the incorporated matter.] An agency may incorporate by refer-  
22. ence such matter in its rules only if the agency, organization, or association  
23. originally issuing that matter makes copies of it readily available to the  
24. public. The rules must state where copies of the incorporated matter are avail-  
25. able at cost from the agency issuing the rule, and are available from the  
26. agency of the United States or this State or another state or the organization  
27. or association originally issuing that matter.



28. (c) The [administrative rules editor] shall prescribe a uniform style  
 29. in which rules must be prepared, and the [secretary of state] shall prescribe  
 30. a standard form to be used in filing rules. Each agency shall follow that  
 31. style and form in preparing and filing its rules pursuant to this Chapter.

## COMMENTS

Subsection (a) standardizes the contents of an adopted rule by requiring all pertinent information to be included therein. An initially adopted rule is, therefore, like a session law of the legislature because it contains information other than the operative text of the rule. As noted in the Comments to Section 2-101, when a rule is first published in the "administrative bulletin" it contains all of the contents indicated in subsection (a) of this section; but when it is later put in the "administrative code" rules compilation, only the operative text of the rule is published.

Subsection (b) is modified North Carolina Act, Section 150A-14. Adoption by reference of later amendments to or editions of the matter incorporated by reference is prohibited by the bracketed language in this subsection because in many states such an incorporation of later amendments or editions would present a serious undue delegation problem. See Annot., 133 A.L.R. 401 (1941); People v. DeSilva 189 N.W.2d 362 (C.A. Mich. 1971); Wallace v. Comm., 184 N.W.2d 588 (Minn. 1971). If a state does not adopt the bracketed language, this Act would not prohibit an agency from incorporating by reference in its rules later amendments to or editions of the matter incorporated.

Subsection (c) is a substantially modified form of Iowa Code, Section 7.17. See also South Dakota Act, Sections 1-26-6.2, 1-26-6.3.

1. SECTION 3-112. [Rule-making Record.]

2. (a) An agency shall maintain an official rule-making record for each  
 3. rule it adopts. The record must be available for public inspection.

4. (b) The rule-making record must contain:

5. (1) copies of all publications in the [administrative bulletin]  
 6. with respect to the rule or the proceeding upon which the rule is based;  
 7. (2) copies of any portions of the agency's public rule-making  
 8. docket containing entries relating to the rule or the proceeding upon  
 9. which the rule is based;



10. (3) all written petitions, requests, submissions, and comments  
11. tendered to the agency, and all written materials considered by the agency,  
12. in connection with the formulation, proposal, or adoption of the rule, or  
13. the proceeding upon which the rule is based;

14. (4) any official transcript of oral presentations made in the  
15. proceeding upon which the rule is based or, if not transcribed, any tape  
16. recording or stenographic record thereof, and any memorandum prepared by a  
17. presiding official summarizing the contents of those presentations;

18. (5) a copy of any regulatory analysis prepared for the proceeding  
19. upon which the rule is based;

20. (6) a copy of the rule and explanatory statement filed in the  
21. office of the [secretary of state];

22. (7) all petitions for exceptions to, amendments of, or repeal or  
23. suspension of, the rule;

24. (8) a copy of any request filed pursuant to Section 3-108(c);

25. (9) a copy of any objection to the rule filed by the [administrative  
26. rules review committee] pursuant to Section 3-204(d) and the agency's response; and

27. (10) a copy of any filed executive order with respect to the rule.

28. (c) Upon judicial review, the record required by this section constitutes  
29. the official agency rule-making record with respect to that rule. Unless  
30. otherwise required by any provision of law, the official agency rule-making  
31. record need not constitute the exclusive basis for agency action on that rule  
32. or judicial review thereof.

## COMMENTS

In requiring an official agency rule-making record, subsection (a) should facilitate a more structured and rational agency and public consideration of proposed rules, and the process of judicial review of the validity of rules. The requirement of an official agency rule-making record has recently been suggested for the Federal Act in S.1291, the "Administrative Practice and Regulatory Control Act of 1979," title I, Section 102(d), [5 U.S.C. 553(d)], 96 Cong. Rec. S7126 at S7129 (daily ed. Jun. 6, 1979) (Sen. Kennedy).

Subsection (b) requires all written submissions made to an agency and all written materials considered by an agency in connection with a rule-making proceeding to be included in the record. It also requires a copy of any existing record of oral presentations made in the proceeding to be included in the rule-making record. In certain instances Section 3-104(b)(3) assures a record of oral presentations in a rule-making proceeding. But subsection (b) does not require other oral communications relating to a rule-making proceeding, whether or not ex parte, to be electronically recorded or reduced to writing and to be included in the official agency rule-making record. It would be undesirable to require all oral communications pertinent to every rule-making proceeding to be electronically recorded or reduced to writing and to be included in the rule-making record. See Scalia, "Two Wrongs Make a Right," Regulation 38 (July-August 1977); Administrative Conference of the U.S., Recommendation no. 77-3, 42 Federal Register 54253 (1977). Cf. Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977). See also generally, "Ex Parte Communication During Informal Rulemaking," 14 Colum. Journ. of Law and Social Prob. 269 (1979). Of course, if an agency wants to impose on itself by rule such a prohibition on ex parte oral communications in rule making, it may do so.

The language of subsection (c) is a modified form of S.1291, the "Administrative Practice and Regulatory Control Act of 1979," title I, Section 102(d), [5 U.S.C. 553(d)], which provides: "The file required by this subsection shall be available to the courts as the agency record in connection with review of the rule, but the file need not constitute the exclusive basis for judicial review or for agency action." See 96 Cong. Rec. S7126 at S7129 (daily ed. Jun. 6, 1979) (Sen. Kennedy). Although this section requires the creation and maintenance of an official agency rule-making record, subsection (c) makes clear that the requirement of such a record does not mean that the rules made must be based exclusively on that rule-making record or judicially reviewed exclusively on the basis of that rule-making record.

Conventional wisdom and substantial experience dictate that neither the making of usual rules by an agency, nor judicial review of their validity, should be required to be based wholly on any official agency rule-making record. See Hamilton, "Procedure for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking," 60 Calif. L. Rev. 1276 (1972); 2 Recommendations and Reports of the Administrative Conference of the U.S., 66 (1970-1972), Recommendation 72-5; Auerbach, MAPA at 218-222. The burden imposed on agencies by a duty in every case to assemble their entire factual and argumentative justification for a rule prior to its adoption, and to enter that entire justification in the official agency



record of the rule-making proceeding, is far too great to justify such a requirement. See also Auerbach, "Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review," 72 N.W. Univ. L. Rev. 15 at 16-17 (1977), stating that an APA should distinguish "between the administrative proceedings on the basis of which an agency promulgates an informal rule and the record on the basis of which the courts determine the rule's validity. The record for judicial review should not be the product of the informal rule-making proceedings, but a record especially made for the purpose." The reason for this is that the purpose of rule-making proceedings should be "'not to try a case' but to contribute to the dual objectives of informing the agency and safeguarding private interests." This statute contemplates, therefore, that in any judicial review proceeding in which the validity of an agency rule is at issue, the agency and the challenging party will have an opportunity, within certain limits, to supplement the official rule-making record required by this section with whatever materials they deem appropriate. See Sections 5-114 and 5-115. Those supplemental submissions and the official rule-making record may be considered by the court, however, only as they are relevant to the specific standards specified for judicial review of agency action in Section 5-116.

SECTION 3-113. [Invalidity of Rules Not Adopted According to Chapter.]

- 1.
2. (a) No rule adopted after [date] is valid unless adopted in substantial
3. compliance with the provisions of Sections 3-102 through 3-108 and 3-110
4. through 3-112. However, inadvertent failure to mail notice of proposed
5. rule adoption to any person as required by Section 3-103(b) does not
6. invalidate a rule.
7. (b) An action to contest the validity of a rule on the grounds of its
8. noncompliance with any of the provisions of Sections 3-102 through 3-108
9. and 3-110 through 3-112 must be commenced within [2] years after the effec-
10. tive date of the rule.

COMMENTS

This section is modified 1961 Revised Model Act, Section 3(c). See Bonfield, IAPA at 873-875. The second sentence of subsection (a) is modified New York Act, Section 202(7).

Subsection (b) is an express exception to the general principle contained in Section 5-108(1) because that section usually permits judicial review of a rule on any ground, at any time. Note, however, that the 1961 Revised Model Act also contains an identical 2 year statute of limitations; and there have been no serious complaints about it in those many states that adopted the provisions of the 1961 Revised Model Act.



SECTION 3-114. [Filing of Rules.]

1. (a) An agency shall file in the office of the [secretary of state]  
2. each rule it adopts and all rules existing on the date of this Act that have  
3. not previously been filed. The filing must be done as soon after adoption of  
4. the rule as is possible. At the time of filing, each rule adopted after the  
5. effective date of this Act must have attached to it the required Section 3-110  
6. explanatory statement. The [secretary of state] shall affix to each rule and  
7. statement a certification of the time and date of filing and keep a permanent  
8. register open to public inspection of all filed rules and attached explanatory  
9. statements.  
10.
11. (b) The [secretary of state] shall transmit to the [administrative  
12. rules editor], [administrative rules counsel], and to the members of the  
13. [administrative rules review committee] a certified copy of each filed rule  
14. as soon after its filing as is possible.

## COMMENTS

Subsection (a) is a substantially modified and extended 1961 Revised Model Act, Section 4(a).

Note that according to this Act, there must be filed in the office of the secretary of state the original of all requests that may be filed under Sections 3-105(a) and 3-108(c), rules and concise explanatory statements that must be filed under this section, objections to rules that may be filed under Section 3-204(d), and executive orders that may be filed under Sections 1-104(a) and 3-202(a)-(b). Certified copies of the originals that are filed in the office of the secretary of state are then sent by that office to designated officials.

SECTION 3-115. [Effective Date of Rules.]

(a) Except to the extent subsection (b) or (c) provides otherwise, each rule hereafter adopted becomes effective [30] days after the later of (i) its filing in the office of the [secretary of state] and (ii) its publication and indexing in the [administrative bulletin]. The date of publication is the later of the date indicated on the issue of the [administrative bulletin] or the date that issue is mailed.

(b) (1) A rule becomes effective on a date later than that established by subsection (a) if a later date is required by statute or specified in the rule.

(2) A rule may become effective immediately upon its filing, or on any subsequent date earlier than that established by subsection (a), if the agency establishes such an effective date and finds that:

(i) it is required by constitution, statute, or court order;

(ii) the rule only confers a benefit or removes a restriction on the public or some segment thereof;

(iii) the rule only delays the effective date of another rule that is not yet effective; or

(iv) the earlier effective date is necessary because of imminent peril to the public health, safety, or welfare. The finding and a brief statement of the reasons therefor required by paragraph (2) must be made a part of the rule. In any action contesting the effective date of a rule made effective under this paragraph, the burden is on the agency to justify its finding.

25. (3) Each agency shall make reasonable efforts to make known to  
26. persons who may be affected by it a rule made effective before publication  
27. and indexing under this subsection.
28. (c) This section does not relieve an agency from compliance with any  
29. provision of law requiring that some or all of its rules be approved by other  
30. designated officials or bodies before they become effective.

## COMMENTS

Subsections (a) and (b) are a very substantially modified and extended 1961 Revised Model Act, Section 4(b), and are based in part on Iowa Act, Section 17A.5(2). The principal changes from the 1961 Revised Model Act version include addition of a required publication before a rule is normally effective; addition of an exception to the usual effective date requirement for a rule only conferring a benefit or removing a restriction on the public; and the shift to an agency using the subsection (b)(2) exemption of the burden of persuasion in any suit challenging the validity of the use of that exemption in a particular case. See Bonfield, IAPA at 884-891.

In addition, the provision adds an exception to the usual effective date requirement for a rule that only delays the effective date of another rule that is not yet effective. This will allow an agency to issue a rule that would be effective immediately to delay the coming into effect of another rule, pending agency action to cure defects in that other rule that were brought to the attention of the agency only after the final adopted form of its text was first published in the administrative bulletin. Note that the problem to which this provision is addressed arises because, according to Section 3-107, there may be some variation between the text of an adopted rule and the text of the previously published proposed rule upon which it is based.

Subsection (c) is modified Massachusetts Act, Chapter 30A, Section 2.

Note that according to Section 3-111(a)-(b), the effective date of a rule must be stated therein. This section only specifies the time the agency may indicate in the rule for its coming into effect.



SECTION 3-116. [Special Provisions for Certain Classes of Rules.]

Except to the extent provided otherwise by any provision of law, Sections 3-102 through 3-115 are inapplicable to:

(1) a rule concerning only the internal management of an agency which does not directly and substantially affect the substantive or procedural rights or duties of any segment of the public;

(2) a rule that sets forth criteria or guidelines to be used by the staff of an agency in the performance of audits, investigations, inspections, in settling commercial disputes or negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if the disclosure of the statement would:

(i) enable law violators to avoid detection;

(ii) facilitate disregard of requirements imposed by law; or

(iii) give a clearly improper advantage to persons who are in an adverse position to the state;

(3) a rule that only establishes specific prices to be charged for particular goods or services sold by an agency;

(4) a rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property;

(5) a rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of that rule is adequately indicated by means of signs or signals to persons who use the facility or property;

(6) a rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital;

27. (7) a form whose contents or substantive requirements are prescribed
28. by rule or statute, and instructions for the execution or use of the form;
29. (8) an agency budget;
30. (9) an opinion of the attorney general; or
31. (10) [the terms of a collective bargaining agreement.]

## COMMENTS

The exemptions from usual rule-making procedures and publication requirements for rules specified in paragraphs (1)-(10) of subsection (a) represent an effort to strike a fair balance between the need for public participation in, and adequate publicity for, agency policymaking on the one hand, and the conflicting need for efficient, economical, and effective government on the other hand. In the case of each one of these types of rules, it was determined that subjecting the particular class of statements in question to the extensive procedures and full publication requirements applicable generally to rules was either unnecessary, unduly burdensome on the agencies, or would lead to inefficient or ineffective government. That is, for these particular types of rules, the costs of submitting them to all usual rule-making requirements was deemed not worth the benefits. See Bonfield, IAPA at 832-833. Note that to the extent other law states that any such exempted rules must follow usual rule-making or publication requirements, they will be subject to those requirements. See Bonfield, IAPA at 844-845. The 1961 Revised Model Act and most state acts accomplish the result of subsection (a) by excluding enumerated statements from their definition of "rule." The more overt approach of this subsection seems preferable.

Exclusionary paragraph (1) is a combination of 1961 Revised Model Act, Section 1(7); Iowa Act, Section 17A.2(7)(a),(c); and New York Act, Section 102(2)(b)(i). See Bonfield, IAPA at 832-836; Auerbach, MAPA at 241-242. Exclusionary paragraph (2) is modified Iowa Act, Section 17A.2(7)(f). See Bonfield, IAPA at 787-791, 839; Auerbach, MAPA at 250. Exclusionary paragraph (3) is a modified form of Iowa Act, Section 17A.2(7)(g) and does not include license fees. See Bonfield, IAPA at 839-841; Auerbach, MAPA at 250-251. Exclusionary paragraph (4) is a modified form of Iowa Act, Section 17A.2(7)(h). See Bonfield, IAPA at 842; Auerbach, MAPA at 251. Exclusionary paragraph (5) is a modified form of Iowa Act, Section 17A.2(7)(i) and, of course, clearly includes highways. See Bonfield, IAPA at 842-843; Cf. Auerbach, MAPA at 247-248. Exclusionary paragraph (6) is a modified form of Iowa Act, Section 17A.2(7)(k). See Bonfield, IAPA at 843-844; Cf. Auerbach, MAPA at 242-245.

Exclusionary paragraph (7) is a modified form of Alaska Act, Section 44.62.640 (a)(2); Wisconsin Act, Section 227.01(11)(q). Exclusionary paragraph (8) is a modified form of Florida Act, Section 120.52(14)(c)(1). Exclusionary paragraph (9) is Iowa Act, Section 17A.2(7)(c). See Bonfield, IAPA at 839; Auerbach, MAPA at 248. Exclusionary paragraph (10) in brackets is meant to eliminate the problems that might arise in states having public employee collective bargaining laws if such a collective bargaining agreement between a state agency and its employees were considered a rule.

Existing acts leave wholly ungoverned agency statements of the general type categorically excluded from usual rule-making requirements by this subsection. States, however, should also give serious consideration to imposing some minimum obligations on agencies with respect to the mode by which they adopt such statements. They might consider, for instance, the addition of a subsection (b) to this section stating:

To the extent it is practicable an agency shall, before adopting a rule under this section, give advance notice in some suitable manner of the contents of the contemplated rule to persons who would be affected by it, and solicit their views thereon.

Note that agencies must maintain some sort of an official, current, dated, and indexed compilation of all Section 3-116 rules. See Section 2-101(g) and the accompanying Comments.

#### SECTION 3-117. [Petition For Adoption of Rule.]

- 1.
2. Any person may petition an agency requesting the adoption of a rule.
3. Each agency shall prescribe by rule the form of the petition and the
4. procedure for its submission, consideration, and disposition. Within
5. [60] days after submission of a petition, the agency shall either (i) deny the
6. petition in writing, stating its reasons therefor, or (ii) initiate rule-making
7. proceedings in accordance with this Chapter, or (iii) if otherwise lawful,
8. adopt a rule.

#### COMMENTS

This section is a substantially modified version of 1961 Revised Model Act, Section 6. See Bonfield, IAPA at 891-895.



## CHAPTER 11: REVIEW OF AGENCY RULES

SECTION 3-201	<u>[Agency Review of Rules.]</u> -----	62
SECTION 3-202	<u>[Gubernatorial Review of Rules; Administrative Rules Counsel.]</u> -----	63
SECTION 3-203	<u>[Administrative Rules Review Committee.]</u> -----	65
SECTION 3-204	<u>[Administrative Rules Review Committee Review of Rules.]</u> -	66

1. SECTION 3-201. [Agency Review of Rules.]

2. At least [annually], each agency shall review all of its rules to deter-  
 3. mine whether any new rule should be adopted. In the process of that review,  
 4. each agency shall prepare a written report summarizing its findings, the  
 5. reasons therefor, and any proposed course of action. For each rule, the  
 6. [annual] report must include at least once every [7] years, a concise statement  
 7. of:

8. (1) the rule's effectiveness in achieving its objectives, including a  
 9. summary of any available data supporting the conclusions reached;

10. (2) criticisms of the rule received during the previous [7] years,  
 11. including a summary of any petitions for waiver of the rule tendered to the  
 12. agency or granted by it; and

13. (3) alternative solutions to the criticisms and the reasons they were  
 14. rejected, or the changes made in the rule in response to those criticisms  
 15. and the reasons therefor. A copy of the [annual] report must be sent to the  
 16. [administrative rules review committee and the administrative rules counsel]  
 17. and be available for public inspection.

## COMMENTS

Sunset provisions for agency rules do not promise to be a very effective method of insuring actual periodic agency reconsideration of their rules. Nor are the benefits of sunset provisions worth the great cost of automatic termination of all agency rules after a specified period, with an accompanying required replay of full rule-making proceedings to extend their life. This section is intended as a practical substitute for the more drastic sunset proposals to assure actual periodic agency reconsideration of their rules.

1. [SECTION 3-202. Gubernatorial Review of Rules;  
2. Administrative Rules Counsel.]

3. (a) To the extent the agency itself would have authority, the governor  
4. may rescind or suspend all or a severable portion of a rule of an agency.  
5. In exercising this authority, the governor shall act by an executive order  
6. that is subject to the requirements applicable to the adoption and effectiveness  
7. of a rule.

8. (b) The governor may summarily terminate any pending rule-making pro-  
9. ceeding by an executive order to that effect, stating therein the reasons for  
10. the action. The executive order must be filed in the office of the [secretary  
11. of state], which shall promptly forward a certified copy to the agency and  
12. the [administrative rules editor]. An executive order terminating a rule-making  
13. proceeding becomes effective on [the date it is filed] and must be published  
14. in the next issue of the [administrative bulletin].

15. (c) Within the office of the governor, there shall be an [administrative  
16. rules counsel] to advise the governor in the execution of the authority vested  
17. under this Article. The [administrative rules counsel] shall be appointed by  
the governor and shall serve at the pleasure of the governor.]

#### COMMENTS

If a state wishes to centralize political responsibility in the governor over agency rules, a state should adopt this bracketed provision. It is a substantially modified Iowa Act, Section 17A.4(6). Note that in several states the governor must approve all agency rules before they may become effective. A governor's refusal to approve a rule in those states has, therefore, the same effect as a veto of the type proposed in this section. See Hawaii Act, Section 91-3(c) and Nebraska Act, Section 84-908. Indiana recently amended its statute, Section 4-22-2-5 (1979), so that if the governor does not disapprove a rule within 15 days of submittal to him, the rule is deemed to be approved.

According to the terms of this section, the directly elected governor may revoke or suspend a rule for any reason and at any time; and he may do so even with respect to independent state agencies. To some extent, at least, such a provision will facilitate ultimate coordination of all rule making, and provide a direct and easily usable political check on the rule-making process. It could be argued that a gubernatorial veto power over rules should be limited in time, as it is in some states, so that it could be exercised only within a specified period after the adoption of a rule. This Act does not,



however, provide any time limit on the exercise of this authority on the theory that a rule may become unwise or politically unacceptable only in light of changed circumstances occurring long after its adoption; and the issuing agency may nevertheless refuse to repeal the rule at that later time. In situations of this kind subsection (a) assumes an effective gubernatorial veto power is fully justified because that state wide, directly elected, official is closer to and more representative of the people than the unelected agency. Furthermore, as noted below, a gubernatorial oversight authority that is unlimited in time is a better alternative external checking device on agency rules than a legislative veto. Nevertheless, in considering the enactment of this provision, each state should consider whether it wants to limit such an executive veto to a specified period after the adoption of a rule.

As noted above, a gubernatorial veto is a viable alternative to suggestions for a direct political check on lawful agency rules that are unacceptable to the community at large, by the vesting of a veto power over such rules in a committee, one house, or two houses of the legislature. There are also a number of reasons why gubernatorial authority of this sort is far superior to any scheme for a legislative veto of rules by means less than statutory. An authority vested in the governor of a state to veto administrative rules avoids the separation of powers problems that legislative veto schemes raise; it avoids the subversion of the governor's authority to veto legislative acts that is inherent in legislative veto schemes; and it keeps effective political and administrative control of all law enforcement in the official who is, by the state constitution, the chief executive, and who is directly politically accountable to the people for the proper performance of that function. See Auerbach, MAPA at 236-237. See also A.B.A. Commission on Law and the Economy, Federal Regulation: Roads to Reform, 79-84 (Final Report 1979), urging enactment of a statute authorizing the President to revoke or modify rules of most agencies, including independent agencies, when the rules relate to "critical issues." Compare the arguments contra in "Delegation and Regulatory Reform: Letting the President Change the Rules," 89 Yale L.J. 561 (1980). Note that there may be a state constitutional problem in some jurisdictions as to the applicability of this section to rules issued by independent agencies expressly created by the state constitution itself.

According to the second sentence of subsection (a), an executive order revoking or suspending an agency rule is subject to all requirements of the Act applicable to the adoption and effectiveness of a rule. This provision will make clear that such an executive order is to be treated as a rule whether or not the governor is partly or entirely exempted from the definition of "agency." Rule-making procedures should be imposed upon the governor in these circumstances because the agency would have had to follow those procedures if it took similar action. Consequently, if the agency may summarily repeal or suspend a rule under this Act, the governor may do so; if the agency may not do so, the governor may not do so, but instead will have to resort to usual rule-making procedures to accomplish that result.

This provision does not give the governor any affirmative authority to create a new agency rule. It only authorizes rescission or suspension of an agency rule, in whole or in severable part, on the theory that the function of the gubernatorial veto over agency rules is primarily that of a negative political check against unwise but lawful agency action. Note also that the governor may repeal or suspend a rule under this section only if the agency could itself lawfully take that action.



Subsection (b) is parallel to Section 3-106(b). Because the agency itself may summarily terminate a pending rule-making proceeding at any time, the governor is empowered to take similar action, thereby directly overruling his less politically responsible administrative subordinates.

Subsection (c) is a modified form of Iowa Code, Section 7.17.

For a discussion of a somewhat different gubernatorial checking authority with respect to rules, see "Wyoming Administrative Regulation Review Act," 14 Land and Water Review 189 (1979). In addition, California recently created a special agency within the executive branch with authority to review the proposed and adopted rules of all agencies, and with authority to veto proposed rules and under some circumstances rescind adopted rules, subject only to an override of its action by the governor. See Cal. Govt. Code, Section 11349-11349.9 (West 1980) and Starr, "California's New Office of Administrative Law and Other Amendments to The California APA: A Bureau to Curb Bureaucracy and Judicial Review, Too," 32 Admin. L. Rev. 713 (1980).

1. [SECTION 3-203. Administrative Rules Review Committee.]

2. There is created the ["administrative rules review committee"] of the  
3. legislature. The committee shall be [bipartisan]; and shall be composed of  
4. [3] senators appointed by the [president of the senate] and [3] representatives  
5. appointed by the [speaker of the house]. A committee member shall be appointed  
6. within [30] days after the convening of a regular session. The term of office  
7. shall be for [2] years while a member of the legislature beginning on the  
8. date of appointment to the committee. However, while a member of the legis-  
9. lature, a member of the committee whose term has expired shall serve until a  
10. successor is appointed. A vacancy on the committee may be filled at any time  
11. by the original appointing authority for the remainder of the term. The  
12. committee shall choose a chairperson from its membership for a [2] year term  
13. and may employ such staff as it deems advisable.]

COMMENTS

This section is modified Iowa Act, Section 17A.8 (1), (2), (4). See Bonfield, IAPA at 899-904. Bracketed Section 3-203 should be enacted unless a state already has an existing standing committee with adequate staff to perform the functions provided in Section 3-204.

SECTION 3-204. [Administrative Rules Review Committee Review of Rules.]

(a) The [administrative rules review committee] shall selectively review possible, proposed, or adopted rules, and prescribe appropriate committee procedures for that purpose. The committee may receive and investigate complaints from members of the public with respect to possible, proposed, or adopted rules, and hold public proceedings thereon.

(b) Committee meetings must be open to the public. Subject to procedures established by the committee, persons may present oral argument, data, or views at those meetings. The committee may require a representative of an agency whose possible, proposed, or adopted rule is under examination to attend a committee meeting and answer relevant questions. The committee may also communicate to the agency its comments on any possible or proposed rule, and require the agency to respond thereto in writing. Unless impracticable, in advance of each committee meeting notice of the time and place of the meeting and the specific subject matter to be considered must be published in the [administrative bulletin].

(c) The committee may recommend enactment of a statute to improve the operation of one or more agencies. The committee may also recommend that a particular rule be superseded in whole or in part by statute. The [speaker of the house and the president of the senate] shall refer those recommendations to the appropriate standing committees. This subsection does not preclude any committee of the legislature from reviewing a rule on its own motion or recommending that it be superseded in whole or in part by statute.

[(d) (1) If the committee objects to all or some portion of a rule because the committee deems it to be beyond the procedural or substantive authority delegated to the adopting agency, the committee may file that objection in the office of the [secretary of state]. The filed objection must contain a concise statement of the committee's reasons for its action.



29.           (2) The [secretary of state] shall affix to each objection a  
30.     certification of the time and date of its filing and as soon thereafter as  
31.     possible shall transmit a certified copy thereof to the agency issuing the  
32.     rule in question, the [administrative rules editor, and the administrative  
33.     rules counsel]. The [secretary of state] shall also maintain a permanent  
34.     register open to public inspection of all committee objections.

35.           (3) The [administrative rules editor] shall publish and index an  
36.     objection filed pursuant to this subsection in the next issue of the [adminis-  
37.     trative bulletin] and indicate its existence adjacent to the rule in question  
38.     when that rule is published in the [administrative code]. In case of a filed  
39.     committee objection to a rule subject to the requirements of Section 2-101(g),  
40.     the agency shall indicate the existence of that objection adjacent to the rule  
41.     in the official compilation referred to in that subsection.

42.           (4) Within [14] days after the filing of a committee objection  
43.     to a rule, the issuing agency shall respond in writing to the committee. After  
44.     receipt of the response, the committee may withdraw or modify its objection.

45.           [(5) After the filing of a committee objection that is not subse-  
46.     quently withdrawn, the burden is upon the agency in any action for judicial review  
47.     or for enforcement of the rule to establish that the whole or portion thereof  
48.     objected to is within the procedural and substantive authority delegated to  
49.     the agency.]

50.           (6) The failure of the [administrative rules review committee]  
51.     to object to a rule is not an implied legislative authorization of its sub-  
52.     stantive or procedural lawfulness.]

53.           (e) The committee may recommend to an agency that it adopt a rule. [The  
54.     committee may also require an agency to publish notice of a committee recommenda-  
55.     tion as a proposed rule of the agency and to allow public participation thereon,



according to the provisions of Sections 3-103 through 3-104. After those proceedings, however, an agency is not required to adopt such a proposed rule.]

(f) The committee shall file an annual report with the [presiding officer] of each house and the governor.

#### COMMENTS

Subsection (a) and (b) are a combination of modified Iowa Act, Section 17A.8(6), and Nebraska Act, Sections 84-908 and 84-908.01.

Subsection (c) is an extended and substantially modified Iowa Act, Section 17A.8(8). Most importantly, it provides that a lawful rule may only be legislatively overcome or altered by statute. That is, legislative suspension or repeal of a particular agency rule, in whole or in part, should ultimately be determined only by joint legislative action subject to the veto of the governor of the state or the overriding of a veto. In many states a one house or two house veto or suspension of a particular agency rule, or a legislative committee veto or suspension of a particular agency rule, may raise serious state constitutional questions. See e.g. Taylor, "Legislative Vetoes and the Massachusetts Separation of Powers Doctrine," 13 Suffolk L. Rev. 1 (1979) and State of Alaska v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

There are three principal arguments for the unconstitutionality under many state constitutions of a legislative veto or suspension mechanism by means other than statute. First, it would improperly impinge upon the governor's veto power. Second, it consists of legislation by an unconstitutional means. Third, it empowers a part of the legislative branch to perform an executive function. In addition, when such a veto or suspension authority is vested in a legislative committee or only one house of the legislature it is alleged to be an undue delegation of legislative power. Despite these arguments, a number of states have enacted statutes authorizing legislative vetoes or suspensions of administrative rules by means other than statute. See National Conference of State Legislatures, Restoring the Balance: Legislative Review of Administrative Regulations 31-44 (1979). A few states have even expressly done so in their constitutions, thereby avoiding any possible constitutional issue. See e.g. Michigan Constit. Art. IV, Section 37 and South Dakota Constit. Art. III, Section 30.

Even if there are no constitutional impediments in a particular state to the use of a one house or two house veto or suspension of a particular agency rule, or a legislative committee veto or suspension of a particular agency rule, they are still undesirable. On the policy reasons against the use of such devices see generally Bruff and Cellhorn, "Congressional Control of Administrative Regulation: A Study of Legislative Vetoes," 90 Harv. L. Rev. 1369 (1977). There are many reasons why legislative vetoes or suspensions of administrative rules by means other than statute should be avoided. In the first place, schemes of this sort aggrandize the legislature's authority at the expense of the executive branch's countervailing independence. By cutting out the veto power of the governor present in the usual legislative process, such mechanisms weaken the state chief executive's bargaining power with the legislature and disable him from checking unsound legislative action. They also facilitate over-involvement of the legislative branch in the day-to-day administration of programs it

creates by statute and induce an unhealthy split in perceived authority over purely administrative matters.

Furthermore, a legislative mechanism for veto or suspension of state agency rules will be useful primarily as a check against unwise rules that are otherwise clearly lawful. For an effective check against most unlawful rules is provided by judicial review, particularly if it is coupled with the reversed burden of persuasion that accompanies the legislative committee objection mechanism proposed in subsection (d) of this section. Therefore, legislative veto or suspension of particular state agency rules will have its primary practical impact on lawful rules and, in effect, would constitute a pro tanto narrowing of the authorizing legislation under which they were otherwise properly issued. Such a narrowing of the authorizing legislation should be executed in the same manner as the legislation was initially adopted. Otherwise, a committee, one house, or two houses of the state legislature, would continually be in a position to subvert proper authorizing action of a more representative and authoritative lawmaking process with built-in checks and balances. A part of the usual statute-making process should not be able to nullify action of the more representative and more authoritative whole, with its built-in checks and balances, lest the very virtues of the whole process be lost. Therefore, all efforts to nullify otherwise lawful agency rules should be executed by joint legislative action, subject to the veto of the governor.

In addition, legislative committee veto or suspension of rules, or one house or two house veto or suspension of rules, may be more susceptible to undue influence by special interest groups acting contrary to the public interest than is veto or suspension by the usual legislative process of statutory enactment. This is another policy reason against veto or suspension of state agency rules by any means other than joint legislative action submitted to the governor. It should also be noted that in some cases the existence of a legislative mechanism to veto or suspend rules by a means that is easier to invoke than the usual statute-making process may have the following undesirable consequence. That mechanism may encourage people to reduce their participation in the rule-making proceeding before the agency and, instead, concentrate their efforts on the alternative legislative veto or suspension mechanism.

If a legislature wishes to vest its administrative rules review committee with more than purely recommendatory authority, it should enact bracketed subsection (d). Subsection (d) is a substantially modified Iowa Act, Section 17A.4(4)(a)-(b). This provision provides an effective legislative check, by means less than statute, on unlawful agency rules. It authorizes a legislative committee to file a formal objection to a rule on the ground that it is procedurally or substantively unlawful. That objection would detail the precise reasons why the committee believes the rule to be unlawful. Notice that such an objection has been filed would be printed adjacent to the rule wherever it is published, and the objection itself would be made available for public inspection. The formal committee objection would then shift to the particular agency the burden of establishing that the rule is procedurally and substantively lawful in any subsequent proceeding for judicial review or for enforcement of the rule. If the agency fails to meet its unusual burden of persuasion in that case, the court would invalidate the entire rule, or the relevant portion thereof.

The filing of a formal objection to a rule by the appropriate legislative committee will place the adopting agency in a dilemma. The agency can rely upon the rule as it is, thereby accepting this special burden of demonstrating



that the rule is wholly lawful in a future court case, or the agency can change the rule in order to reinstate the usual presumption of validity that attaches to an agency rule. The extent to which an agency will be amenable to modifying the rule to eliminate any objection of the committee will obviously depend upon the extent to which the agency thinks it needs the challenged rule in its original form, and the agency's confidence that it can overcome its special burden of persuading the court that the rule in that form is lawful in all respects. If the rule's validity is doubtful because it is not clearly procedurally and substantively lawful, the agency will usually modify the rule: for the reversed burden of persuasion will result in the invalidation of many rules of doubtful legality when they are challenged in court. Of course, the legislative committee's objection authority would not interfere with the operation or effectiveness of clearly valid agency rules. The committee is only authorized to alter one aspect of the procedure by which the legality of the rule will be finally determined by the courts.

As a consequence, a legislative committee with authority to object to agency rules in the manner described in subsection (d) will be a credible check on illegal agency rule making. The committee-objection mechanism proposed here may be justified, therefore, on the ground that its mere existence is likely to make agencies act more responsibly in exercising their rule-making powers; for they will know that the shift in the burden of persuasion after a committee objection will, in close cases, make judicial invalidation of the rule much more likely than at present. Actual exercise of its objection authority by a legislative committee will also have the added benefit of inducing agencies which have issued rules of doubtful or clear illegality to withdraw them, thereby sparing the public the cost of complying with those rules or contesting them in the courts. Finally, it seems desirable to provide a means by which members of the public who are aggrieved by allegedly illegal agency rules can, in those cases where their claims are especially credible, be aided in their efforts to secure a judicial invalidation of those rules. A good way to separate the credible claims deserving such help from those that do not is by securing an evaluation of the legality of the rules in question by an independent responsible body external to the agency. And a good way to aid such aggrieved persons whenever that independent evaluation agrees with their contention is to shift the burden of persuasion in any subsequent judicial proceeding involving the validity of those rules from the assailant, who had to convince the court they were unlawful, to the agency, which is then required to convince the court that they are lawful.

It is also logical to shift to the agency the burden of demonstrating the validity of a rule in subsequent litigation when a more politically accountable and independent body objects thereto. Unlike the agency, the legislative committee members are directly accountable to the public and represent the body that created the agency and invested it with whatever authority the agency may lawfully exercise. The usual presumption of validity accorded an agency rule, therefore, may reasonably be deemed inappropriate when a legislative committee believes the rule to be unlawful. Furthermore, legislatures have always been assumed to have the authority, which they have often exercised, to allocate the burden of persuasion in court litigation, so long as they act "reasonably" when they do so. And a shift in the burden of persuasion as to the validity of a particular rule in these circumstances certainly seems "reasonable." Note also that there is a clear standard against which the committee is to operate when it objects: "beyond the procedural or substantive authority delegated to the adopting agency." And the committee must include the specific reasons for its



action in the objection so that courts and others who wish to examine the specific grounds supporting an objection may easily do so.

In addition, it should be noted that the reversed burden-of-persuasion mechanism is a fair compromise between the extremes of authorizing one house of the legislature or a legislative committee to veto, temporarily or permanently, rules issued by an agency, and authorizing a legislative committee merely to recommend to the legislature that it overrule such regulations by statute. The undesirability of such a one house or a committee veto was discussed above.

Of course, as paragraph (6) of subsection (d) states, the failure of the appropriate legislative committee to file a formal objection to a rule should not be construed by a reviewing court as an implied legislative authorization of the rule. Time constraints will often prevent the appropriate committee from carefully reviewing all agency rules; and an affected party may decide to seek judicial relief directly rather than a legislative committee objection. Therefore, it would be unfair to imply negatively legislative authorization for any rule merely because no objection to it had been filed by the committee.

Currently, only Iowa and Montana provide for a scheme whereby the burden of persuasion as to the validity of a rule is reversed after an objection has been filed to the rule by a legislative committee. See Iowa Act, Section 4(4), and Montana Act, Section 2-4-506(3). The constitutionality of that scheme has been upheld in Iowa. In doing so, the Iowa Supreme Court voided certain agency rules solely because the agency, after those rules were formally objected to as unlawful by the appropriate legislative committee, could not meet its burden of persuading the court that they were lawful in all respects. The court intimated that if the objection had not been filed it might have held the rules valid. See Schmitt v. Iowa Dept. of Social Services, 263 N.W.2d 739 (Iowa 1978). In another Iowa case, the court upheld an agency rule after an objection to it had been filed by the appropriate legislative committee, because the agency successfully met its burden and persuaded the court that the rule was lawful. Iowa Auto Dealers Ass'n v. Iowa Dept. Revenue, N.W.2d (1981).

See Bonfield, IAPA at 905-924, for a discussion of the desirability and operation of this reversed burden-of-persuasion mechanism after an authorized legislative committee formally objects to a rule.

\* Though not provided for in the text of subsection (d), a state enacting it might also consider adding a provision providing as follows. Whenever a rule is invalidated because an agency fails to meet its legislative committee imposed special burden of persuasion under subsection (d)(5), judgment shall also be rendered against the agency for court costs, including a reasonable attorney's fee. Reimbursement of this sort would encourage aggrieved persons to litigate the validity of rules that are tainted by a formal, legislative committee objection, and would thus remove one obstacle -- financial expense -- that discourages persons from seeking judicial review of unlawful agency rules. The Iowa Act has such a provision in its Section 4(4). If it is desired to add a provision of this type to Section 3-204(d)(5) it might be added at the very end and provide:

and render judgment against the agency for court costs. Court costs include a reasonable attorney's fee and are payable by the [state comptroller] from the support appropriations of the agency that adopted the rule.

Subsection (c) authorizes the administrative rules review committee to recommend to an agency that it repeal, amend, suspend, or adopt a rule. For states that wish to go further, the bracketed second sentence also empowers the committee to require an agency to publish notice of the rule change recommended by the committee as a proposed rule of the agency, and to conduct public proceedings thereon according to the provisions of Sections 3-103 through 3-104. The purpose of this provision is to assure fully informed agency decision making on the subject of a committee recommendation. It also is geared to assure increased agency accountability to the public by focusing some of the same political pressures on the agency with respect to the subject at issue as are focused on the legislative process. Authorizing this legislative committee, on its own say so, to require an agency to initiate such rule making does not seem an undue legislative encroachment on lawful agency administrative initiatives in light of the express reservation in the last sentence of ultimate authority in the agency over whether it will finally adopt a proposed rule based upon a committee recommendation.









1 received, an agency may omit the statement of reasons.

2 (2) Rules may not unnecessarily repeat statutory  
3 language. Whenever it is necessary to refer to statutory  
4 language in order to convey the meaning of a rule  
5 interpreting the language, the reference shall clearly  
6 indicate that portion of the language which is statutory and  
7 the portion which is amplification of the language.

8 (3) Each proposed and adopted rule shall include a  
9 citation to the specific grant of rulemaking authority  
10 pursuant to which it or any part thereof is adopted. In  
11 addition, each proposed and adopted rule shall include a  
12 citation to the specific section or sections in the Montana  
13 Code Annotated which the rule purports to implement.

14 (4) Each rule proposed and adopted by an agency  
15 implementing a policy of a governing board or commission  
16 must include a citation to and description of the policy  
17 implemented. Each agency rule implementing a policy, as used  
18 in the definition set forth in 2-4-102(10), and the policy  
19 itself must be based on legal authority and otherwise comply  
20 with the requisites for validity of rules established by  
21 this chapter.

22 (5) To be effective, each substantive rule adopted  
23 must be within the scope of authority conferred and in  
24 accordance with standards prescribed by other provisions of  
25 law.

1 (6) Whenever by the express or implied terms of any  
2 statute a state agency has authority to adopt rules to  
3 implement, interpret, make specific, or otherwise carry out  
4 the provisions of the statute, no rule adopted is valid or  
5 effective unless:

6 (a) consistent and not in conflict with the statute;  
7 and

8 (b) reasonably necessary to effectuate the purpose of  
9 the statute. Such reasonable necessity must be demonstrated  
10 in the agency's notice of proposed rulemaking and in the  
11 written and oral data, views, comments, and testimony  
12 considered by the agency.

13 (7) No rule is valid unless adopted in substantial  
14 compliance with 2-4-302 or 2-4-303 and this section and  
15 unless notice of adoption thereof is published within 6  
16 months of the publishing of notice of the proposed rule. If  
17 an amended or supplemental notice of either proposed or  
18 final rulemaking, or both, is published concerning the same  
19 rule, the 6-month limit must be determined with reference to  
20 the latest notice in all cases."

21 Section 2. Section 2-4-402, MCA, is amended to read:

22 "2-4-402. Powers of the committee -- duty to review  
23 rules. (1) The committee shall review all proposed rules  
24 filed with the secretary of state.

25 (2) Rules proposed by the department of revenue may be



1 reviewed only in regard to the procedural requirements of  
2 the Montana Administrative Procedure Act.

3 (3) The committee may:

4 (a) review the written and oral data, views, comments,  
5 and testimony considered by the agency and advise the agency  
6 whether, in the judgment of the committee, a rule is  
7 reasonably necessary to effectuate the purpose of the  
8 statute;

9 (b) prepare written recommendations for the  
10 adoption, amendment, or rejection of a rule and submit those  
11 recommendations to the department proposing the rule and  
12 submit oral or written testimony at a rulemaking hearing;

13 (c) require that a rulemaking hearing be held in  
14 accordance with the provisions of 2-4-302 through 2-4-305;

15 (d) institute, intervene in, or otherwise  
16 participate in proceedings involving this chapter in the  
17 state and federal courts and administrative agencies;

18 (e) review the incidence and conduct of  
19 administrative proceedings under this chapter."

-End-

1 \_\_\_\_\_ BILL NO. \_\_\_\_\_

2 INTRODUCED BY \_\_\_\_\_

3 BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT TO ALLOW THE  
6 ADMINISTRATIVE CODE COMMITTEE TO POLL THE LEGISLATURE TO  
7 DETERMINE THE INTENTION OF THE LEGISLATURE WITH RESPECT TO  
8 ANY EXISTING ADMINISTRATIVE RULE; CLARIFYING HOW LEGISLATORS  
9 MAY OBJECT TO ANY RULE; ALLOWING A POLL TO BE TAKEN ONLY IF  
10 THE LEGISLATURE IS NOT IN REGULAR SESSION; AND CLARIFYING  
11 WHERE POLL RESULTS ARE TO BE PUBLISHED; AMENDING SECTIONS  
12 2-4-306 AND 2-4-403, MCA."

13

14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

15 Section 1. Section 2-4-403, MCA, is amended to read:

16 "2-4-403. Legislative intent -- poll. (1) If the  
17 legislature is not in regular session, the committee may  
18 poll all members of the legislature by mail to determine  
19 whether a proposed rule or rule that has been adopted or  
20 amended within 2 years is consistent with the intent of the  
21 legislature.

22 (2) Should 20 or more legislators object to any rule  
23 by filing written letters of objection with the committee,  
24 the committee shall poll the members of the legislature.

25 (3) The poll shall include an opportunity for the



1 agency to present a written justification for the rule to  
2 the members of the legislature ~~and for the committee to~~  
3 ~~present its objection, if any, to the rule to the members of~~  
4 ~~the legislature."~~

5 Section 2. Section 2-4-306, MCA, is amended to read:

6 "2-4-306. Filing, format, and effective date --  
7 dissemination of emergency rules. (1) Each agency shall file  
8 with the secretary of state a copy of each rule adopted by  
9 it.

10 (2) The secretary of state may prescribe a format,  
11 style, and arrangement for notices and rules which are filed  
12 pursuant to this chapter and may refuse to accept the filing  
13 of any notice or rule that is not in compliance therewith.  
14 He shall keep and maintain a permanent register of all  
15 notices and rules filed, including superseded and repealed  
16 rules, which shall be open to public inspection and shall  
17 provide copies of any notice or rule upon request of any  
18 person. Unless otherwise provided by statute, the secretary  
19 of state may require the payment of the cost of providing  
20 such copies.

21 (3) In the event that the administrative code  
22 committee has conducted a poll of the legislature in  
23 accordance with 2-4-403 or the revenue oversight committee  
24 has conducted a poll in accordance with 5-18-109, the  
25 results of the poll shall be published with the rule in the

1     **ARM.**

2     (4) Each rule shall become effective after publication  
3     in the register as provided in 2-4-312, except that:

4         (a) If a later date is required by statute or  
5     specified in the rule, the later date shall be the effective  
6     date;

7         (b) subject to applicable constitutional or statutory  
8     provisions, an emergency rule shall become effective  
9     immediately upon filing with the secretary of state or at a  
10    stated date following publication in the register if the  
11    agency finds that this effective date is necessary because  
12    of imminent peril to the public health, safety, or welfare.  
13    The agency's finding and a brief statement of reasons  
14    therefor shall be filed with the rule. The agency shall take  
15    appropriate measures to make emergency rules known to every  
16    person who may be affected by them."

-End-





1 \_\_\_\_\_ BILL NO. \_\_\_\_\_

2 INTRODUCED BY \_\_\_\_\_

3 BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT TO REQUIRE THAT NOTICES  
6 OF PROPOSED RULEMAKING UNDER THE MONTANA ADMINISTRATIVE  
7 PROCEDURE ACT BE MAILED TO CERTAIN SOCIETIES WHOSE MEMBERS  
8 WOULD BE DIRECTLY AFFECTED BY THE PROPOSED RULE; AMENDING  
9 SECTION 2-4-302, MCA."

10

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12 Section 1. Section 2-4-302, MCA, is amended to read:

13 "2-4-302. Notice, hearing, and submission of views.

14 (1) Prior to the adoption, amendment, or repeal of any rule,

15 the agency shall give written notice of its intended action.

16 The notice shall include a statement of either the terms or

17 substance of the intended action or a description of the

18 subjects and issues involved, the rationale for the intended

19 action, and the time when, place where, and manner in which

20 interested persons may present their views thereon.

21 (2) ~~(a)~~ The notice shall be filed with the secretary

22 of state for publication in the register as provided in

23 2-4-312 and mailed within 3 days of publication;

24 ~~(i)~~ to persons who have made timely requests to the

25 agency for notice of its rulemaking proceedings; ~~and~~

1       ~~(iii) to the offices of any reasonably identifiable~~  
2       ~~professional, trade, or industrial society whose members~~  
3       ~~would be directly affected by the proposal.~~

4       (b) The notice shall be published and mailed at least  
5       30 days in advance of the agency's intended action.

6       (3) If any statute provides for a different method of  
7       publication, the affected agency shall comply with the  
8       statute in addition to the requirements contained herein.  
9       However, in no case may the notice period be less than 30  
10      days or more than 6 months.

11      (4) Prior to the adoption, amendment, or repeal of any  
12      rule, the agency shall afford interested persons at least 20  
13      days' notice of a hearing and 28 days from the day of notice  
14      to submit data, views, or arguments, orally or in writing.  
15      In the case of substantive rules, the notice of proposed  
16      rulemaking must state that opportunity for oral hearing  
17      shall be granted if requested by either 10% or 25, whichever  
18      is less, of the persons who will be directly affected by the  
19      proposed rule, by a governmental subdivision or agency, by  
20      the administrative code committee, or by an association  
21      having not less than 25 members who will be directly  
22      affected.

23      (5) An agency may continue a hearing date for cause.  
24      In the discretion of the agency, contested case procedures  
25      need not be followed in hearings held pursuant to this



1 section. If a hearing is otherwise required by statute,  
2 nothing herein alters that requirement.

3 (6) If an agency fails to publish a notice of adoption  
4 within the time required by 2-4-305(7) and the agency again  
5 proposes the same rule for adoption, amendment, or repeal,  
6 the proposal must be considered a new proposal for purposes  
7 of compliance with this chapter.

8 (7) At the commencement of any hearing on the intended  
9 action, the person designated by the agency to preside at  
10 the hearing shall read aloud the "Notice of Function of  
11 Administrative Code Committee" appearing in the register."

-End-

1. The first of these is the fact that the system is not a simple one, but a complex one, involving many different factors, and the results of which are not always predictable.
2. The second is the fact that the system is not a static one, but a dynamic one, and the results of which are not always predictable.
3. The third is the fact that the system is not a linear one, but a non-linear one, and the results of which are not always predictable.
4. The fourth is the fact that the system is not a homogeneous one, but a heterogeneous one, and the results of which are not always predictable.
5. The fifth is the fact that the system is not a uniform one, but a non-uniform one, and the results of which are not always predictable.
6. The sixth is the fact that the system is not a continuous one, but a discontinuous one, and the results of which are not always predictable.
7. The seventh is the fact that the system is not a smooth one, but a non-smooth one, and the results of which are not always predictable.
8. The eighth is the fact that the system is not a regular one, but an irregular one, and the results of which are not always predictable.
9. The ninth is the fact that the system is not a periodic one, but a non-periodic one, and the results of which are not always predictable.
10. The tenth is the fact that the system is not a bounded one, but an unbounded one, and the results of which are not always predictable.

1 \_\_\_\_\_ BILL NO. \_\_\_\_\_

2 INTRODUCED BY \_\_\_\_\_

3 BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT TO REDUCE THE NUMBER OF  
6 COPIES OF THE ADMINISTRATIVE RULES OF MONTANA TO BE PROVIDED  
7 TO COUNTIES; GIVING THE GOVERNING BODY OF THE COUNTY  
8 DISCRETION ON DISTRIBUTION; AND REDUCING THE NUMBER OF  
9 COPIES PROVIDED TO THE LEGISLATIVE COUNCIL; AMENDING SECTION  
10 2-4-313, MCA."

11

12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

13 Section 1. Section 2-4-313, MCA, is amended to read:

14 "2-4-313. Distribution, costs, and maintenance. (1)

15 The secretary of state shall distribute copies of ARM and  
16 supplements or revisions thereto, with costs paid as  
17 provided in 2-4-312(2), to the following:

18 (a) attorney general, one copy;

19 ~~(b) -- clerk of each court of record of this state, one~~  
20 ~~copy;~~

21 ~~(c) (b)~~ clerk of United States district court for the  
22 district of Montana, one copy;

23 ~~(d) (c)~~ clerk of United States court of appeals for the  
24 ninth circuit, one copy;

25 ~~(e) (d)~~ county commissioners or governing body of each



1 county clerk of this state, for use of county officials and  
 2 the public, one-copy at least one but not more than two  
 3 copies, which may be maintained in a public library in the  
 4 county seat or in the county offices as the county  
 5 commissioners or governing body of the county may determine;

6 (f)(e) state law library, one copy;

7 (g)(f) state historical society, one copy;

8 (h)(g) each unit of the Montana university system, one  
 9 copy;

10 (i)(h) law library of the university of Montana, one  
 11 copy;

12 (j)(i) legislative council, ~~three~~ two copies;

13 (k)(j) library of congress, one copy;

14 (l)(k) state library, one copy.

15 (2) The secretary of state, ~~clerk--of--each--court--of~~  
 16 ~~record--in--the--state, clerk-of~~ each county in the state, and  
 17 the librarians for the state law library and the university  
 18 of Montana law library shall maintain a complete, current  
 19 set of ARM, including supplements or revisions thereto. Such  
 20 persons shall also maintain the register issues published  
 21 during the preceding 2 years. The secretary of state shall  
 22 also maintain a permanent set of the registers.

23 (3) The secretary of state shall make copies of and  
 24 subscriptions to ARM and supplements or revisions thereto  
 25 and the register available to any person at prices fixed in

1 accordance with subsection (4).

2 (4) The secretary of state, in consultation with the  
3 administrative code committee, shall determine the cost of  
4 supplying copies of ARM and supplements or revisions thereto  
5 and the register. The cost shall be the approximate cost of  
6 publication, including indexing, printing or duplicating,  
7 and mailing, less fees charged agencies pursuant to  
8 subsection (6) and money appropriated for 2-4-312(2) and  
9 2-4-313(1). However, a uniform price per page or group of  
10 pages may be established without regard to differences in  
11 cost of printing different parts of ARM and supplements or  
12 revisions thereto and the register.

13 (5) The secretary of state shall deposit all fees he  
14 collects in an account within the revolving fund created for  
15 paying the expenses of publication of ARM and the register.

16 (6) The secretary of state may charge agencies a  
17 filing fee for all material to be published in ARM or the  
18 register. He shall fix, in consultation with the  
19 administrative code committee, the fee to cover a portion of  
20 the costs of publication and mailing."

-End-

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1 \_\_\_\_\_ BILL NO. \_\_\_\_\_

2 INTRODUCED BY \_\_\_\_\_

3 BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT TO REQUIRE A GRANT OF  
6 RULEMAKING AUTHORITY WITH EACH STATUTE ENACTED OR AMENDED IF  
7 IT IS TO BE IMPLEMENTED BY AN ADMINISTRATIVE RULE; AMENDING  
8 SECTIONS 2-4-305 AND 5-4-402, MCA; AND PROVIDING AN  
9 APPLICABILITY CLAUSE."

10

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12 Section 1. Section 2-4-305, MCA, is amended to read:

13 "2-4-305. Requisites for validity -- authority and  
14 statement of reasons. (1) The agency shall consider fully  
15 written and oral submissions respecting the proposed rule.  
16 Upon adoption of a rule, an agency shall issue a concise  
17 statement of the principal reasons for and against its  
18 adoption, incorporating therein its reasons for overruling  
19 the considerations urged against its adoption. If  
20 substantial differences exist between the rule as proposed  
21 and as adopted and the differences have not been described  
22 or set forth in the adopted rule as that rule is printed in  
23 the Montana administrative register, the differences must be  
24 described in the statement of reasons for and against agency  
25 action. When no written or oral submissions have been

1 received, an agency may omit the statement of reasons.

2 (2) Rules may not unnecessarily repeat statutory  
3 language. Whenever it is necessary to refer to statutory  
4 language in order to convey the meaning of a rule  
5 interpreting the language, the reference shall clearly  
6 indicate that portion of the language which is statutory and  
7 the portion which is amplification of the language.

8 (3) Each proposed and adopted rule shall include a  
9 citation to the specific grant of rulemaking authority  
10 pursuant to which it or any part thereof is adopted. A rule  
11 proposed and adopted to implement a statute referred to in  
12 5-4-402(3) must include a citation to the session laws of  
13 Montana containing the specific grant of rulemaking  
14 authority pursuant to which it or any part thereof is  
15 adopted. In addition, each proposed and adopted rule shall  
16 include a citation to the specific section or sections in  
17 the Montana Code Annotated which the rule purports to  
18 implement.

19 (4) Each rule proposed and adopted by an agency  
20 implementing a policy of a governing board or commission  
21 must include a citation to and description of the policy  
22 implemented. Each agency rule implementing a policy, as used  
23 in the definition set forth in 2-4-102(10), and the policy  
24 itself must be based on legal authority and otherwise comply  
25 with the requisites for validity of rules established by



1 this chapter.

2 (5) To be effective, each substantive rule adopted  
3 must be within the scope of authority conferred and in  
4 accordance with standards prescribed by other provisions of  
5 law.

6 (6) Whenever by the express or implied terms of any  
7 statute a state agency has authority to adopt rules to  
8 implement, interpret, make specific, or otherwise carry out  
9 the provisions of the statute, no rule adopted is valid or  
10 effective unless consistent and not in conflict with the  
11 statute and reasonably necessary to effectuate the purpose  
12 of the statute.

13 (7) No rule is valid unless adopted in substantial  
14 compliance with 2-4-302 or 2-4-303 and this section and  
15 unless notice of adoption thereof is published within 6  
16 months of the publishing of notice of the proposed rule. If  
17 an amended or supplemental notice of either proposed or  
18 final rulemaking, or both, is published concerning the same  
19 rule, the 6-month limit must be determined with reference to  
20 the latest notice in all cases."

21 Section 2. Section 5-4-402, MCA, is amended to read:

22 "5-4-402. Purpose. (1) The legislature finds that it  
23 must accept the ultimate responsibility for the increase in  
24 the discretionary authority of state executive branch  
25 agencies, as evidenced by proliferating rules, forms,



1 orders, and licensing proceedings before state agencies.

2 (2) The purpose of this Legislative History Act is to  
3 assure that statutes henceforth enacted to grant additional  
4 discretionary authority to state agencies are accompanied by  
5 a clear indication of the legislature's intent as to how  
6 such discretion is to be exercised and the legislature's  
7 purpose for delegating the authority.

8 ~~(3) A statute enacted or amended may not be~~  
9 ~~implemented by an administrative rule, even in an area in~~  
10 ~~which a state agency has existing rulemaking authority,~~  
11 ~~unless the statute enacted or amended is accompanied by a~~  
12 ~~delegation of authority extending such authority to the~~  
13 ~~statute as enacted or amended. If the delegation of~~  
14 ~~authority supplements existing statutory rulemaking~~  
15 ~~authority, the delegation of authority must be included in a~~  
16 ~~codification instruction."~~

17 NEW SECTION. Section 3. Applicability. This act  
18 applies to statutes enacted or amended after October 1,  
19 1983.

-End-

1 \_\_\_\_\_ BILL NO. \_\_\_\_\_

2 INTRODUCED BY \_\_\_\_\_

3 BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE  
6 LAW RELATING TO STATEMENTS OF ECONOMIC IMPACT OF PROPOSED  
7 ADMINISTRATIVE RULEMAKING; AMENDING SECTIONS 2-4-305 AND  
8 2-4-405, MCA."

9

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11 Section 1. Section 2-4-405, MCA, is amended to read:

12 "2-4-405. ~~Estimate---of---economic~~ Economic impact  
13 statement. (1) Upon ~~written~~ request of the administrative  
14 code committee ~~based upon the affirmative request of at~~  
15 ~~least five members of the committee at an open meeting,~~ an  
16 agency ~~designated by the committee~~ shall prepare a statement  
17 of the ~~estimated~~ economic impact of the adoption, amendment,  
18 or repeal of a rule as proposed. The ~~administrative code~~  
19 ~~committee may also, by contract, prepare such an estimate.~~  
20 ~~Except to the extent that the request expressly waives any~~  
21 ~~one or more of the following, the requested~~ statement must  
22 include ~~and the statement prepared by the committee may~~  
23 include an estimate of:

24 ~~{a}--the--cost--to--the--state--of--administering--and~~  
25 ~~enforcing the rule;~~



1       ~~(b)--the--aggregate--cost--of--compliance--to--all--persons~~  
2       ~~affected; and~~

3       ~~(c)--any--economic--benefit--of--compliance--to--all--persons~~  
4       ~~affected;~~

5       (a) a description of the classes of persons who will  
6       be affected by the proposed rule, including classes that  
7       will bear the costs of the proposed rule and classes that  
8       will benefit from the proposed rule;

9       (b) a description of the probable economic impact of  
10       the proposed rule upon affected classes of persons and  
11       quantifying, to the extent practicable, that impact;

12       (c) the probable costs to the agency and to any other  
13       agency of the implementation and enforcement of the proposed  
14       rule and any anticipated effect on state revenues;

15       (d) an analysis comparing the costs and benefits of  
16       the proposed rule to the costs and benefits of inaction;

17       (e) an analysis that determines whether there are less  
18       costly or less intrusive methods for achieving the purpose  
19       of the proposed rule;

20       (f) an analysis of any alternative methods for  
21       achieving the purpose of the proposed rule that were  
22       seriously considered by the agency and the reasons why they  
23       were rejected in favor of the proposed rule;

24       (g) a determination as to whether the proposed rule  
25       represents an efficient allocation of public and private



1 resources; and

2 (b) a quantification or description of the data upon  
3 which subsections (1)(a) through (1)(g) are based and an  
4 explanation of how the data was gathered.

5 (2) A request must be made by the committee prior to  
6 the final agency action on the rule and suspends for not  
7 more than 6 months any rulemaking proceedings under this  
8 chapter then in progress. If a rulemaking hearing has  
9 already been held or was scheduled by the agency prior to  
10 the request or decision for a statement, a rehearing or  
11 initial hearing must be held by the agency upon approval of  
12 the statement by the administrative code committee or by the  
13 governor. Written notice of the committee's decision to  
14 prepare a statement shall be sent to the agency and has the  
15 same effect as a committee request to an agency. The  
16 statement must be filed with the secretary of state for  
17 publication in the register, filed with the administrative  
18 code committee and with the governor, and mailed to persons  
19 who have requested advance notice of the agency's rulemaking  
20 proceedings within 3 months of the committee's request or  
21 decision. The statement must be published and mailed at  
22 least 20 days prior to the adoption, amendment, or repeal of  
23 the rule. If a hearing is held, it must be published 20 days  
24 prior to the hearing. The committee may withdraw its request  
25 or decision for an economic impact statement at any time.

1       ~~{3}--If-it-is-impossible-to-formulate-such-an-estimate~~  
2       ~~the--reasons--for--impossibility--of--formulation--must---be~~  
3       ~~published-instead-of-the-estimate~~

4       {4}{3} This section does not apply to rulemaking  
5       pursuant to 2-4-303.

6       {5}{4} The final adoption, amendment, or repeal of a  
7       rule is not subject to challenge in any court as a result of  
8       the inaccuracy or inadequacy of a statement required under  
9       this section. However, the committee may approve the  
10      statement or may recommend disapproval of any statement  
11      prepared by an agency or under contract for the committee  
12      that it determines inadequately covers those items contained  
13      in subsections (1)(a) through (1)(b).

14      {5} If the committee recommends disapproval of an  
15      economic impact statement, it shall give written notice of  
16      that fact to the governor. The governor shall either approve  
17      or disapprove the economic impact statement. The governor  
18      may not approve or disapprove a statement prior to receipt  
19      of notice from the committee.

20      {6} No agency may initiate or continue rulemaking  
21      proceedings once suspended for any rule substantially the  
22      same as the rule for which proceedings were suspended until  
23      approval of the applicable statement by the committee or the  
24      governor pursuant to subsection (5) or until expiration of 6  
25      months following suspension of the rule, whichever occurs



1 first. Following approval of the statement by the committee  
2 or the governor or the expiration of 6 months following  
3 suspension of the rule, the agency may again proceed with  
4 rulemaking. If no hearing has been scheduled on the proposed  
5 rule pursuant to 2-4-405(2), notice of opportunity for  
6 hearing shall be given in accordance with 2-4-302(4) and the  
7 proposed rule shall be subject to the provisions of that  
8 section."

9 Section 2. Section 2-4-305, MCA, is amended to read:

10 "2-4-305. Requisites for validity -- authority and  
11 statement of reasons. (1) The agency shall consider fully  
12 written and oral submissions respecting the proposed rule.  
13 Upon adoption of a rule, an agency shall issue a concise  
14 statement of the principal reasons for and against its  
15 adoption, incorporating therein its reasons for overruling  
16 the considerations urged against its adoption. If  
17 substantial differences exist between the rule as proposed  
18 and as adopted and the differences have not been described  
19 or set forth in the adopted rule as that rule is printed in  
20 the Montana administrative register, the differences must be  
21 described in the statement of reasons for and against agency  
22 action. When no written or oral submissions have been  
23 received, an agency may omit the statement of reasons.

24 (2) Rules may not unnecessarily repeat statutory  
25 language. Whenever it is necessary to refer to statutory



1 language in order to convey the meaning of a rule  
2 interpreting the language, the reference shall clearly  
3 indicate that portion of the language which is statutory and  
4 the portion which is amplification of the language.

5 (3) Each proposed and adopted rule shall include a  
6 citation to the specific grant of rulemaking authority  
7 pursuant to which it or any part thereof is adopted. In  
8 addition, each proposed and adopted rule shall include a  
9 citation to the specific section or sections in the Montana  
10 Code Annotated which the rule purports to implement.

11 (4) Each rule proposed and adopted by an agency  
12 implementing a policy of a governing board or commission  
13 must include a citation to and description of the policy  
14 implemented. Each agency rule implementing a policy, as used  
15 in the definition set forth in 2-4-102(10), and the policy  
16 itself must be based on legal authority and otherwise comply  
17 with the requisites for validity of rules established by  
18 this chapter.

19 (5) To be effective, each substantive rule adopted  
20 must be within the scope of authority conferred and in  
21 accordance with standards prescribed by other provisions of  
22 law.

23 (6) Whenever by the express or implied terms of any  
24 statute a state agency has authority to adopt rules to  
25 implement, interpret, make specific, or otherwise carry out

1 the provisions of the statute, no rule adopted is valid or  
2 effective unless consistent and not in conflict with the  
3 statute and reasonably necessary to effectuate the purpose  
4 of the statute.

5 (7) No rule is valid unless adopted in substantial  
6 compliance with 2-4-302 or 2-4-303 and this section and  
7 unless notice of adoption thereof is published within 6  
8 months of the publishing of notice of the proposed rule. If  
9 an amended or supplemental notice of either proposed or  
10 final rulemaking, or both, unrelated to the suspension of a  
11 rule under 2-4-405, is published concerning the same rule,  
12 the 6-month limit must be determined with reference to the  
13 latest notice in all cases.

14 (8) If rulemaking proceedings are suspended by action  
15 of the administrative code committee under 2-4-405 prior to  
16 the expiration of the 6-month deadline provided for in  
17 subsection (7), the agency may, following approval of the  
18 economic impact statement by the committee or the governor  
19 or the expiration of 6 months from the action of the  
20 committee suspending the rule, proceed with rulemaking  
21 during the 6-month period following the approval of the  
22 economic impact statement or expiration of the period of  
23 suspension."

-End-

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1 \_\_\_\_\_ BILL NO. \_\_\_\_\_

2 INTRODUCED BY \_\_\_\_\_

3 BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE FOR DIRECT  
6 REPEAL OF ADMINISTRATIVE RULES BY BILL; PROVIDING FOR  
7 LEGISLATIVE DIRECTION BY BILL OR LEGISLATIVE REQUEST BY  
8 JOINT RESOLUTION OF AGENCY ADOPTION, AMENDMENT, OR REPEAL OF  
9 ADMINISTRATIVE RULES AND REQUIRING COMPLIANCE WITH THAT  
10 DIRECTION WHEN ADOPTED IN BILL FORM; AMENDING SECTION  
11 2-4-412, MCA."

12

13 WHEREAS, section 2-4-412, MCA, provides for the direct  
14 repeal of administrative rules by joint resolution of the  
15 Legislature and requires changes to be made in rules or new  
16 rules to be adopted in accordance with joint resolutions of  
17 the Legislature; and

18 WHEREAS, on March 18, 1982, District Judge Gordon  
19 Bennett ruled in the case of The\_\_\_Montana\_\_\_Taxpayers  
20 Association\_\_v.\_\_The\_\_Department\_of\_Revenue, Lewis and Clark  
21 County Civil No. 47126, that the Legislature's authority to  
22 mandate a change in administrative rules by joint resolution  
23 is unconstitutional, as a violation of the doctrine of  
24 separation of powers; and

25 WHEREAS, the Legislature considers it desirable to

1     advise agencies by joint resolution that rules be adopted,  
2     amended, or repealed and expects its directions to agencies  
3     to have the force of law when adopted in the form of a bill.

4  
5     THEREFORE, it is the intent of the Legislature to  
6     provide for the direct repeal of administrative rules by  
7     bills, to provide for legislative requests or advice for the  
8     adoption, amendment, or repeal of administrative rules by  
9     joint resolution, to provide for legislative direction for  
10    the adoption, amendment, or repeal of administrative rules  
11    by bill, and to require agency compliance with that  
12    direction when adopted in bill form.

13  
14    BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

15  
16       Section 1. Section 2-4-412, MCA, is amended to read:  
17       "2-4-412. Legislative review of rules -- effect of  
18       failure to object. (1) The legislature may, by joint  
19       ~~resolution bill~~, repeal any rule in ARM. If a rule is  
20       repealed, the legislature shall in the ~~joint-resolution bill~~  
21       state its objections to the repealed rule. If an agency  
22       adopts a new rule to replace the repealed rule, the agency  
23       shall adopt the new rule in accordance with the objections  
24       stated by the legislature in the ~~joint-resolution bill~~. If  
25       the legislature does not repeal a rule filed with it before

1 the adjournment of that regular session, the rule remains  
2 valid.

3 (2) The legislature may also, by joint resolution  
4 ~~request or advise, and by bill~~ direct ~~a change to be made in~~  
5 ~~the adoption, amendment, or repeal of~~ any rule ~~in--ARM--or~~  
6 ~~direct--the--adoption--of--an--additional--rule.~~ If a change in  
7 any rule or the adoption of an additional rule is advised,  
8 requested, or directed to be made, the legislature shall in  
9 the joint resolution or bill state the nature of the change  
10 or the additional rule to be made and its reasons therefor.  
11 The agency shall, in the manner provided in the Montana  
12 Administrative Procedure Act, adopt a new rule in accordance  
13 with the legislative direction in a bill.

14 (3) Rules ~~made--by--agencies~~ and changes in rules  
15 ~~directed---by---the---legislature~~ made by agencies under  
16 subsection (2) of this section shall conform and be pursuant  
17 to statutory authority.

18 (4) Failure of the legislature or the administrative  
19 code committee to object in any manner to the adoption,  
20 amendment, or repeal of a rule is inadmissible in the courts  
21 of this state to prove the validity of any rule."

-End-





1                    \_\_\_\_\_ JOINT RESOLUTION NO. \_\_\_\_\_

2        INTRODUCED BY \_\_\_\_\_

3                    BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

4

5        A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF  
6        REPRESENTATIVES OF THE STATE OF MONTANA TO AMEND JOINT RULES  
7        6-1, 6-7, AND 6-34, RELATING TO CHANGES IN ADMINISTRATIVE  
8        RULES, TO MAKE THE JOINT RULES COMPATIBLE WITH STATUTORY  
9        AMENDMENTS MADE BY \_\_\_ BILL NO. \_\_\_ [LC 321].

10

11        WHEREAS, section 2-4-412, MCA, authorizing the  
12        Legislature to repeal or direct the amendment or adoption of  
13        administrative rules by joint resolution, is amended by the  
14        provisions of \_\_\_ Bill No. \_\_\_ [LC 321] to make the law  
15        consistent with the decision of the court in the case of The  
16        Montana Taxpayers' Association v. The Department of Revenue,  
17        Lewis and Clark County Civil No. 47126, which held that the  
18        Legislature could not constitutionally make changes to  
19        administrative rules by joint resolution; and

20        WHEREAS, the joint rules of the Senate and House of  
21        Representatives refer only to joint resolutions concerning  
22        changes to administrative rules; and

23        WHEREAS, the joint rules should be made compatible with  
24        the statutory changes made to section 2-4-412, MCA, by  
25        \_\_\_ Bill No. \_\_\_ [LC 321].

1  
2 NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE  
3 OF REPRESENTATIVES OF THE STATE OF MONTANA:

4 That Joint Rules 6-1, 6-7, and 6-34 be amended to read:

5 "6-1. The only types of instruments other than bills  
6 which may be introduced in either house of the legislature  
7 are as follows:

8 (1) A simple resolution is a formalized motion passed  
9 by one house only and bears the heading "House Resolution"  
10 or "Senate Resolution". It may be used only to adopt or  
11 amend the rules of one house or to provide for the internal  
12 affairs of the house adopting it. It does not require three  
13 readings or a roll call vote. A member offering a simple  
14 resolution may read it in his place before introduction.  
15 When a simple resolution has been introduced, it shall be  
16 referred to a committee. Final action shall be taken on the  
17 Committee of the Whole report. The transmittal of copies of  
18 simple resolutions is the responsibility of the chief clerk  
19 or secretary of the house of origin.

20 A copy of every simple resolution is to be transmitted  
21 after adoption to the secretary of state by the secretary of  
22 the Senate or chief clerk of the House.

23 (2) A joint resolution must be adopted by both houses  
24 and is not approved by the governor. It may be used to:



1 (a) express desire, opinion, sympathy, or request of  
2 the legislature;

3 (b) request an interim study by a legislative  
4 subcommittee;

5 (c) adopt or amend the joint rules;

6 (d) set salaries and other terms of employment for  
7 Legislative employees;

8 (e) approve construction of a state building under  
9 section 18-2-102 or 20-25-302, MCA;

10 (f) deal with disasters and emergencies under Title  
11 10, specifically as provided in sections 10-3-302(3),  
12 10-3-303(3), 10-3-303(4), and 10-3-505(5), MCA;

13 (g) submit a negotiated settlement under section  
14 39-31-305(3), MCA;

15 (h) declare or terminate an energy emergency under  
16 section 90-4-310, MCA;

17 (i) ratify or propose amendments to the United States  
18 Constitution; or

19 (j) ~~direct--changes--to~~ advise or request the repeal,  
20 amendment, or direct adoption of a rule in the Montana

## 1 Administrative Code Rules of Montana.

2           Except as otherwise provided in these rules or the  
3       Constitution of the State of Montana, a joint resolution is  
4       treated in all respects as a bill.

5           A copy of every joint resolution is to be transmitted  
6   after adoption to the secretary of state by the secretary of  
7   the Senate or chief clerk of the House."

8 "6-7. The following schedule must be followed for  
9 submission of drafting requests and introduction of bills  
10 and resolutions.

11	Request	Introduction
12	Deadline	Deadline
13	5:00 P.M.	5:00 P.M.
14	<u>Legislative Day</u>	

## 15 General Bills and Resolutions

16 10 14  
17 (or 2 legislative  
18 days after delivery  
19 if delivery is  
20 after 14th day)

## 21 Revenue Bills

17 21

## 22 Committee Bills and Resolutions

1		36	40
2	Committee Revenue Bills		
3		62	66
4	Appropriation Bills		
5		No deadline	No deadline
6	Interim Study Resolutions		
7		No deadline	No deadline
8	<u>Bills repealing or directing</u>		
9	<u>the amendment or adoption</u>		
10	<u>of Administrative Rules and</u>		
11	Joint Resolutions Concerning		
12	<u>advising or requesting the</u>		
13	<u>repeal, amendment, or adoption</u>		
14	<u>of Administrative Rules</u>		
15		No deadline	No deadline"
16	"6-34. No bill, except for appropriation bills,		
17	revenue bills, and amendments considered by joint committee,		
18	need be acted upon (save for reference to a committee by the		
19	presiding officer) if transmitted from one house to the		
20	other after the 45th legislative day, but shall be held		
21	pending in the house to which it is transmitted unless		
22	two-thirds of the members present and voting determine that		
23	the bill shall be acted upon. Amendments, except to		



1 appropriation bills and revenue bills, shall likewise be  
2 deferred for consideration if transmitted after the 70th  
3 legislative day.

4 A revenue bill is one which would either increase or  
5 decrease tax collections.

6 Appropriation and revenue bills shall be transmitted  
7 from the original house on or before the 70th day unless  
8 two-thirds of the members present and voting in the  
9 receiving house determine that the bill may be transmitted  
10 after the 70th day.

11 Interim study resolutions, ~~bills repealing or directing~~  
12 ~~the amendment or adoption of administrative rules~~, and joint  
13 resolutions concerning ~~advising or requesting the repeal~~  
14 ~~amendment, or adoption of~~ administrative rules may be  
15 transmitted at any time during a session."

-End-

1 \_\_\_\_\_ BILL NO. \_\_\_\_\_

2 INTRODUCED BY \_\_\_\_\_

3 BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT TO ELIMINATE THE  
6 REQUIREMENT THAT AGENCIES REPORT TO THE ADMINISTRATIVE CODE  
7 COMMITTEE THEIR RECOMMENDATIONS FOR LEGISLATION CLARIFYING  
8 GRANTS OF RULEMAKING AUTHORITY; AMENDING SECTION 2-4-314,  
9 MCA."

10

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12 Section 1. Section 2-4-314, MCA, is amended to read:

13 "2-4-314. Biennial review by agencies -- report  
14 ~~recommendations by committee.~~ (1) Each agency shall at least  
15 biennially review its rules to determine if any new rule  
16 should be adopted or any existing rule should be modified or  
17 repealed.

18 ~~{2}--Prior--to--October-1, 1988, and prior to October-1~~  
19 ~~of each even-numbered year--thereafter,--each--agency--shall~~  
20 ~~prepare--and--submit--a--report--to--the-administrative-code~~  
21 ~~committee,--in-tabular-or-other-form,--indicating-the-agency's~~  
22 ~~recommendations-for-legislation-which-will-clarify--existing~~  
23 ~~grants--of--rulemaking--authority--and--grant--or--eliminate~~  
24 ~~rulemaking-authority-as-necessary.~~

25 {3}[2] The committee may recommend to the legislature

1 those modifications, additions, or deletions of agency  
2 rulemaking authority which the committee considers  
3 necessary."

-End-



4  
5 A BILL FOR AN ACT ENTITLED: "AN ACT TO AUTHORIZE THE  
6 ADMINISTRATIVE CODE COMMITTEE TO OBJECT TO ANY RULE UPON THE  
7 GROUND THAT IT WAS ADOPTED IN SUBSTANTIAL VIOLATION OF THE  
8 PROCEDURAL OR SUBSTANTIVE AUTHORITY DELEGATED TO THE AGENCY;  
9 REQUIRING THE AGENCY, AFTER OBJECTION BY THE COMMITTEE, TO  
0 PROVE THE LAWFULNESS OF THE RULE; AWARDING COSTS AND  
1 ATTORNEY FEES AGAINST THE AGENCY IF THE RULE IS INVALIDATED  
2 BY COURT JUDGMENT; AMENDING SECTION 2-4-506, MCA."

NEW\_SECTION. Section 1. Committee objection to  
ation of authority for rule -- effect. (1) If the  
nistrative code committee objects to all or some portion  
a proposed or adopted rule because the committee  
iders it not to have been proposed or adopted in  
stantial compliance with 2-4-302, 2-4-303, and 2-4-305,  
committee shall send a written objection to the agency  
n promulgated the rule. The objection must contain a  
ise statement of the committee's reasons for its action.

(2) Within 14 days after the mailing of a committee objection to a rule, the agency promulgating the rule shall

1 respond in writing to the committee. After receipt of the  
2 response, the committee may withdraw or modify its  
3 objection.

4 (3) If the committee fails to withdraw or  
5 substantially modify its objection to a rule, it may vote to  
6 send the objection to the secretary of state who shall, upon  
7 receipt thereof, publish the objection in the Montana  
8 Administrative Register adjacent to any notice of adoption  
9 of the rule and in the ARM adjacent to the rule. Costs of  
10 publication of the objection shall be borne by the  
11 committee.

12 (4) If an objection to all or a portion of a rule has  
13 been published pursuant to subsection (3), the agency bears  
14 the burden, in any action challenging the legality of the  
15 rule or portion of a rule objected to by the committee, of  
16 proving that the rule or portion of the rule objected to was  
17 adopted in substantial compliance with 2-4-302, 2-4-303, and  
18 2-4-305. Whenever a rule is invalidated by court judgment  
19 because the agency failed to meet its burden of proof  
20 imposed by this subsection, the court shall award costs and  
21 reasonable attorney fees against the agency.

22 Section 2. Section 2-4-506, MCA, is amended to read:

23 "2-4-506. Declaratory judgments on validity or  
24 application of rules. (1) A rule may be declared invalid or  
25 inapplicable in an action for declaratory judgment if it is

1 found that the rule or its threatened application interferes  
2 with or impairs or threatens to interfere with or impair the  
3 legal rights or privileges of the plaintiff.

4 (2) A rule may also be declared invalid in such an  
5 action on the grounds that the rule was not adopted with an  
6 arbitrary--or--capricious--disregard--for--the--purpose--of  
7 authorizing--statutes--as--evidenced--by--documented--legislative  
8 intent in substantial compliance with 2-4-302, 2-4-303, and  
9 2-4-305.

10 {3}--If--the--administrative--code--committee--has--objected  
11 to--the--adoption--or--amendment--of--a--rule--on--the--grounds--set  
12 forth--in--subsection--{2},--the--agency--bears--the--burden--in--any  
13 action--brought--under--this--section--of--proving--that--its--rule  
14 was--not--adopted--with--an--arbitrary--or--capricious--disregard  
15 for--the--purpose--of--the--authorizing--statute.

16 {4}{3} A declaratory judgment may be rendered whether  
17 or not the plaintiff has requested the agency to pass upon  
18 the validity or applicability of the rule in question.

19 {5}{4} The action may be brought in the district court  
20 for the county in which the plaintiff resides or has his  
21 principal place of business or in which the agency maintains  
22 its principal office. The agency shall be made a party to  
23 the action."

24 NEW SECTION. Section 3. Codification instruction.  
25 Section 1 is intended to be codified as an integral part of



- 1 Title 2, chapter 4, part 4, and the provisions of Title 2,
- 2 chapter 4, apply to section 1.

-End-

1 \_\_\_\_\_ BILL NO. \_\_\_\_\_

2 INTRODUCED BY \_\_\_\_\_

3 BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT TO REQUIRE THE  
6 PUBLICATION OF A STATEMENT, WITH EVERY RULE PROPOSED AND  
7 ADOPTED UNDER IMPLIED RULEMAKING AUTHORITY, THAT THE RULE  
8 LACKS THE FORCE AND EFFECT OF LAW."

9

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11 Section 1. Statement of implied authority and legal  
12 effect of rule. (1) Each adjective or interpretive rule or  
13 portion of such a rule adopted or to be adopted under  
14 implied rulemaking authority shall contain a statement in  
15 the historical notations of the rule that the rule is  
16 adopted under implied authority and as such does not have  
17 the force and effect of law.

18 (2) Upon request of the administrative code committee,  
19 an agency shall publish the statement required by subsection  
20 (1) for any proposed or adopted rule from which it has been  
21 omitted. If the committee requests the statement to be  
22 published for an adopted rule not scheduled for reprinting  
23 in the ARM, the cost of publishing the statement in the ARM  
24 shall be borne by the committee.

25 Section 2. Codification instruction. Section 1 is

1 intended to be codified as an integral part of Title 2,  
2 chapter 4, and the provisions of Title 2, chapter 4, apply  
3 to section 1.

-End-



4 A BILL FOR AN ACT ENTITLED: "AN ACT TO REQUIRE THE  
5 ADMINISTRATIVE CODE COMMITTEE TO REVIEW ALL RULES ADOPTED  
6 PRIOR TO APRIL 14, 1975, FOR COMPLIANCE WITH SECTION  
7 2-4-305, MCA; PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A  
8 TERMINATION DATE."

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11           Section 1. Review of existing rules required.  
12   Notwithstanding the provisions of 2-4-402, the  
13   administrative code committee shall review all  
14   administrative rules adopted under the Montana  
15   Administrative Procedure Act prior to April 14, 1975. The  
16   committee shall review the rules to determine whether  
17   agencies have substantially complied with subsections (5)  
18   and (6) of 2-4-305, as that section read on November 18,  
19   1982.

20           Section 2. Power of the committee. (1) If the  
21       committee determines that a rule violates 2-4-305(5) or  
22       2-4-305(6), as that section read on November 18, 1982, it  
23       may:

24 (a) take those steps authorized by 2-4-402(3)(a); or  
25 (b) poll the legislature in accordance with 2-4-403,

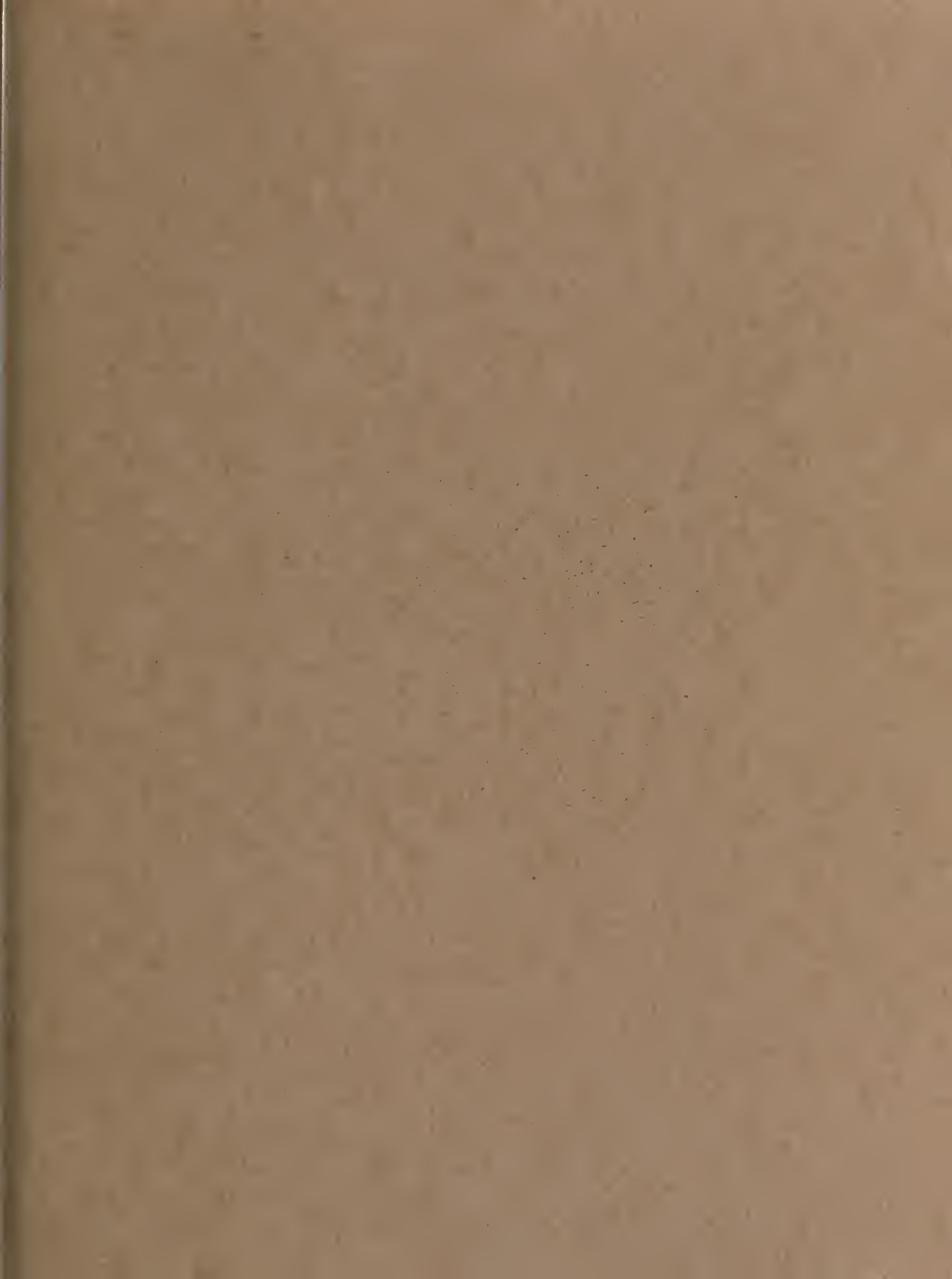
1 as that section may be amended by \_\_\_Bill No. \_\_\_ [LC 10]. If  
2 2-4-403 is not amended by \_\_\_Bill No. \_\_\_ [LC 10], no poll of  
3 the legislature may be taken by the committee on any rule  
4 reviewed pursuant to [section 1].

5 (2) The committee may advise an agency concerning such  
6 matters as clarity, form, style, grammar, punctuation, and  
7 spelling with respect to any rule reviewed under [section  
8 1].

9 Section 3. Committee to report to legislature. Prior  
10 to January 1, 1987, the committee shall prepare a report of  
11 its activities and any recommendations to be submitted to  
12 the legislature.

13 Section 4. Effective date -- termination. This act is  
14 effective on passage and approval and terminates January 1,  
15 1987.

-End-







250 copies of this public document were published at an estimated cost of \$3.55 per copy, for a total cost of \$806.80, which includes \$806.80 for printing and \$.00 for distribution.